Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

JAMES J. CONDIT, JR., et al.,

Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

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46 pp.

QUESTIONS PRESENTED

I. ARE COUNTIES AND CITIES WHOSE POLICY MAKERS ENFORCE A COURT ORDER IN A MANNER WHICH VIOLATES CONSTITUTIONAL RIGHTS ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983?

II. ARE LAW ENFORCEMENT OFFICIALS ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983 WHEN THEIR MANNER OF ENFORCING A COURT ORDER VIOLATED THE ORDER ITSELF AND RESULTED IN CONSTITUTIONAL VIOLATIONS?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellants: JAMES J. CONDIT, JR., KATHY CONDIT, ROSEMARY CALLAHAN, DAVID CALLAHAN, MICHAEL O'BRIEN, NANCY O'BRIEN, WARREN SMITH, PAMELA SMITH, ANTHONY TIDWELL, SHEILA TIDWELL, MICHAEL MEYER, SARA MEYER, THOMAS SINGLETON, JASON MILLER, CYNTHIA CONKLIN, DAVID CONKLIN, TERRI CONKLIN, ROGER SPRY, DON JOHNSON, JOSEPH EDWARD MARTIN, JOHN PARKER, TERRY PARKER, JOANNE ENGEL, DANIEL ENGEL, and KATHLEEN ENGEL, a minor by Joanne Engel.

Defendants-Appellees: HAMILTON COUNTY, OHIO, HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, SIMON L. LEIS, LINCOLN STOKES, DANIEL WOLFANGEL, DANIEL LOSITO, CITY OF CINCINNATI, LAWRENCE E. WHALEN, DONALD HUDSON, and DANIEL CAIN

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No.

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JAMES J. CONDIT, JR., et al.,

Petitioners,

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HAMILTON COUNTY, OHIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

James J. Condit, Jr., Anthony Tidwell, Thomas Singleton, Jason Miller, Roger Spry, Cynthia Conklin, David Conklin, Donald Johnson, Thomas Davis, Gerald Taylor, Joseph Edward Martin and Kathleen Engel (a minor, by Joanne Engel) respectfully petition for a writ of certiorari to review the judgment of the Hamilton County Court of Appeals, First

Appellate District of Ohio, which affirmed the Final Judgment of the Hamilton County Court of Common Pleas granting Summary Judgment to Respondents and denying partial Summary Judgment to Petitioners.

OPINIONS BELOW

The Opinion of the Hamilton County Court of Appeals, First Appellate District of Ohio, is unpublished. The electronic citation is *Condit v. Planned Parenthood* (Feb. 26, 1997), 1997 WL 78589, Hamilton App. No. C960126. The opinion is reprinted in Appendix D.

The Decision of the Hamilton County Court of Common Pleas granting summary judgment to the Respondents and dismissing Petitioners' claims is also unpublished. It is reprinted in Appendix E.

JURISDICTION

Jurisdiction is conferred in this case pursuant to 28 U.S.C. § 1257(a). The Hamilton County Court of Common Pleas entered Final Judgment on January 25, 1996. The Hamilton County Court of Appeals, First Appellate District of Ohio, affirmed the judgment on February 26, 1997.

The Supreme Court of Ohio declined to exercise jurisdiction of Petitioners' appeal and denied review of the Judgment of the First Appellate District of Ohio on June 18, 1997. See Appendix C.

The Supreme Court of Ohio denied Petitioners' Motion For Reconsideration on September 3, 1997. See Appendix B

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in Appendix A are U.S. Const. Amendment I, U.S. Const. Amendment IV, U.S. Const. Amendment XIV, Section I, and 42 U.S.C. §1983.

STATEMENT OF THE CASE

1. The State Court Injunction Action.

On March 26, 1986, Planned Parenthood Association of Cincinnati, Inc. ("Planned Parenthood") filed a Complaint in the Hamilton County (Ohio) Court of Common Pleas seeking injunctive relief against various groups and individuals, whom Planned Parenthood alleged had committed a variety of tortious acts in the vicinity of its abortion clinic located on Vine Street in Cincinnati, Ohio. The name of the case was *Planned Parenthood v. Project Jericho*.

Planned Parenthood originally sued only a small number of groups and individuals, but soon became more ambitious. Rather than seeking to enjoin and punish actual wrongdoers, Planned Parenthood moved for certification of a defendant class so that everyone served with a copy of the injunction would be bound by it. In spite of the over-

whelming due process problem posed by such a blanket injunction, Hamilton County Common Pleas Judge Thomas Crush ("Judge Crush") accommodated Planned Parenthood's desires on June 20, 1986 with the Preliminary Injunction described below.

Petitioner Condit was one of the individual defendants originally sued by Planned Parenthood. Unlike the other Petitioners, therefore, Condit at least had notice of the litigation and an opportunity to defend himself. However, Planned Parenthood offered no evidence of wrongdoing by Condit and Judge Crush made no such finding. Still, Judge Crush designated Condit as a representative of the defendant class which he later certified and enjoined.

None of the other Petitioners herein were ever named as parties, given notice of the class certification hearing, or otherwise permitted to assert individual defenses (i.e., innocence of any wrongdoing) prior to the issuance of the injunction described below. Indeed, many of these Petitioners did not live in Cincinnati and had never even been present at the clinic until June 28, 1986, eight days after the Injunction was issued.

2. The Court Orders.

Judge Crush issued two orders relevant to the arrests in this case. On June 20, 1986, he certified a defendant class and issued a preliminary injunction ("Injunction") against it. *See Appendix F.* The Injunction defined the defendant class as follows:

> Persons picketing between the South curb of Louis Ave and the North curb of Shields Avenue and on both sides of Vine Street from Louis Ave to Shields Ave who have been personally served with this order as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who received personal service of the order.

The Injunction imposed a limit of five pickets on the east side of Vine Street, as well as other restrictions. Receiving personal service of the Injunction was a prerequisite of class membership, so that no one was bound by the Injunction unless first served with a copy of it. (This is a crucial fact for deciding the immunity issue.)

On June 27, 1986, Judge Crush issued a second order titled "Order to the Sheriff", which required the Hamilton County Sheriff to be present at the clinic on Saturdays, to serve individuals with the Injunction, and to arrest violators. *See Appendix G.* Judge Crush also made the following remarks in open court on June 27, 1986 consistent with his Order To The Sheriff:

> I am now signing an order that henceforth the Sheriff shall arrest on the spot anyone violating my order. See that that's filed, copy given to the Sheriff. I do request orally that no arrests be made unless the service has been photographed, the violation has been photographed and an affidavit signed on the spot by someone who knows the facts.

3. The Conspiracy.

Petitioners were arrested as a direct result of a civil conspiracy which took place later that day between Planned Parenthood's attorneys and members of the Hamilton County Sheriff's Office (collectively "Sheriff"), who agreed upon a scheme for enforcing the injunction. The scheme permitted Planned Parenthood to interpret the injunction, determine who was violating it, and provide affidavits to the Sheriff, who would then execute the arrests.

4. The Arrests and Constitutional Violations.

On June 28, 1986, a hundred or more people showed up to protest at the clinic. By morning's end, Petitioners were arrested by Respondents for doing little more than walking, standing, or kneeling in prayer on the public streets and sidewalks. Moreover, people affiliated with Planned Parenthood, members of the media, and other unidentified members of the general public were permitted to freely walk, stand, or kneel in the same areas and in the same manner as the Petitioners were, with no threat of arrest. However, only those persons exhibiting pro-life views or identifiable as pro-life protestors were arrested.[1]

In direct violation of the Order To The Sheriff, seven of the Petitioners (Tidwell, Miller, Taylor, Spry, C. Conklin, D. Conklin and Engel) were arrested without being served with a copy of the Injunction. In other words, they

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[1] These facts go to the core of Petitioners' substantive constitutional claims, which were not addressed on the merits by any of the lower courts and therefore will not be addressed in this Petition.

were arrested for violating an injunction which they had no legal duty to obey. Two others (Davis and Johnson) were arrested by the Sheriff based upon boilerplate affidavits which were prepared by Planned Parenthood but which were never completed and charged them with no offense. Condit, Singleton and Martin, were arrested while clearly complying with the Injunction. The Sheriff made the arrests without using any independent discretion, without judicial review and in the absence of any criminal activity. Except for Kathleen Engel (a juvenile who was held for only about one hour), all of the Petitioners were incarcerated for 13 hours even though they were innocent.

Charges against all of the Petitioners were later dismissed without trial, and the Injunction was later dissolved without ever being made a final appealable order. Therefore, this §1983 damage action is the only vehicle available to Petitioners for vindicating their constitutional rights.

5. Facts Supporting County and City Liability Under §1983.

Respondent Lincoln Stokes was the Hamilton County Sheriff at the time and personally participated in the arrests. He was the top policy-making official in Hamilton County for law enforcement procedures and enforcement of court orders.

Moreover, the City of Cincinnati has stipulated that Respondents Hudson and Cain acted pursuant to the policies, customs, training and instruction of the City of

Cincinnati and its Police Division when they aided the Sheriff in making the arrest of Respondent Joseph Martin.

6. Facts Supporting Individual Liability Under §1983.

It is undisputed that Respondents Stokes, Wolfangle, Losito, Hudson and Cain were all present and personally participated in the arrests.

7. Proceedings Below and Decisions of the Lower Courts.

On June 26, 1987, Petitioners (and several others who are no longer parties to this appeal) filed a Complaint in the Hamilton County (Ohio) Court of Common Pleas seeking monetary damages pursuant to 42 U.S.C. §1983. Petitioners alleged wrongful arrests and the violation of their rights under the First, Fourth and Fourteenth Amendments to the U.S. Constitution. Named as defendants were various individuals affiliated with Planned Parenthood (all of whom were dismissed as parties pursuant to a settlement in 1990) and the following (governmental Respondents:

a) Hamilton County, Ohio, Board of County Commissioners of Hamilton County, Ohio, Lincoln Stokes, Daniel Wolfangel and Daniel Losito; and

b) City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain.

After discovery, two amendments of the Complaint and the disposition of numerous pretrial motions (some of which disposed of other claims and parties), the remaining parties filed cross motions for summary judgment on September 13 & 14, 1995. On January 16, 1996, the Trial Court issued a Decision[2] denying Petitioners' motion for partial summary judgment and granting summary judgment in favor of Respondents. On January 25, 1996, Final Judgment was entered accordingly.

On February 23, 1996, Plaintiffs appealed to the Hamilton County Court of Appeals, First Appellate District of Ohio, which affirmed the judgment of the Trial Court on February 26, 1997. On April 14, 1997, Petitioners appealed to the Supreme Court of Ohio, which declined jurisdiction on June 18, 1997. On June 28, 1997, Petitioners filed a Request For Reconsideration, which the Supreme Court of Ohio denied on September 3, 1997.

8. Stage of Proceedings Where Federal Questions Were Raised.

Petitioners asserted all of their federal constitutional claims in their Complaint(s) and also in their Motion for Partial Summary Judgment filed on September 14, 1995. The Respondents asserted the defense of absolute quasi-judicial immunity in their respective Answers and in their Motions for Summary Judgment filed on September 13, 1995.

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[2] The Trial Court's decision [Appendix E] makes reference to opinions written earlier in the case, but none of them disposed of the claims and issues raised in this Petition.

Petitioners asserted error in the Hamilton County Court of Appeals as follows:

ISSUE #1 PRESENTED FOR REVIEW

Defendants Hamilton County, Ohio and the City of Cincinnati, as governmental entities, are not entitled to absolute quasi-judicial immunity.

ISSUE #2 PRESENTED FOR REVIEW

Individual Sheriff deputies and police officers are not entitled to absolute quasi-judicial immunity when they violate the very orders they are charged with enforcing.

Petitioners asserted those same errors to the Supreme Court of Ohio in their Memorandum In Support of Jurisdiction filed on April 14, 1997;

PROPOSITION OF LAW #1

Counties and cities, as governmental entities are not entitled to absolute quasi- judicial immunity in claims under 42 U.S.C. Section 1983.

PROPOSITION OF LAW #2

Police Officers are not entitled to absolute quasi-judicial immunity when they violate the judicial order they are enforcing.

REASONS FOR GRANTING THE WRIT

In *Planned Parenthood v. Project Jericho* (1990), 52 Ohio St.3d 56, 556 N.E.2d 157, the Supreme Court of Ohio reviewed and upheld the contempt convictions of several other protestors who were convicted for violating the same injunction under which Petitioners were arrested in this case. In doing so, the Supreme Court of Ohio upheld the validity of an extremely dubious injunction and class certification. Although Petitioners will always believe that *Planned Parenthood* was wrongly decided[3], it is not dispositive of the issues raised in this Petition, which focuses on independent law enforcement decisions (by, or in accord with, County and City policy making officials) which led to the wrongful and discriminatory arrests of innocent people based exclusively on political affiliation and viewpoint.

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[3] All of the facts and all of the binding precedent which required the opposite result were omitted from this Court's published opinion.

ISSUE #1
COUNTIES AND CITIES WHOSE POLICY MAKERS ENFORCE A COURT ORDER IN A MANNER WHICH VIOLATES CONSTITUTIONAL RIGHTS ARE NOT ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983.

The Court of Appeals held that Respondents Hamilton County and City of Cincinnati enjoy absolute quasi-judicial immunity for their role in enforcing the Injunction. Although this Court has never addressed (as an actual holding of a case) the availability of absolute quasi-judicial immunity to cities and counties whose agents enforce a court order, it has done the next best thing in other cases with clear discussions of the immunities available to individuals and governmental entities sued under 42 U.S.C. §1983.

This analysis begins with *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), wherein this Court set forth the principles for establishing municipal liability under §1983. Under *Monell*, the conventional tort principle of respondent superior was rejected. *Id.* at 691. However, this Court went on to hold that municipalities can be held liable for constitutional violations under §1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...." *Id.* at 694.

If *Monell* left other immunity questions unanswered, they began to be answered shortly thereafter. In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court held that local governments are ***not*** entitled to qualified immunity.

Further clarification on the question of municipal immunities was later provided in *Kentucky v. Graham*, 473 U.S. 159 (1985), when this Court explained the difference between official capacity actions and individual capacity actions and stated:

> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. In an official capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment.

473 U.S. at 166-67. Because official capacity actions are the equivalent of suing the government itself, it necessarily follows that those same personal immunity defenses are not available to governments.

Most recently, in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993), Chief Justice Rehnquist discussed similar municipal liability and immunity issues while rejecting a heightened pleading standard for §1983 claims against municipalities. Writing for a unanimous Court and reaffirming the *Monell* principle, he stated:

> These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit - either absolute

> or qualified - under §1983. In short, a municipality can be sued under §1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury.

507 U.S. at 166.

It could not be more clear. Only someone deliberately misreading this Court's explicit statements could now conclude that cities and counties are entitled to the absolute immunities available to government officials.

The decision of the Court of Appeals in this case is also contrary to the case law developing in the federal circuits. See *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992) ("the City, unlike the individual officers in this case, is not entitled to any level of immunity...."); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2nd Cir. 1992) (rejecting absolute legislative immunity for a municipal corporation and citing extensively from *Graham* and *Owen*); *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991) (rejecting absolute prosecutorial immunity for county).

The Court of Appeals in this case disregarded all such authority and relied instead on *Doe v. McFaul*, 599 F.Supp. 1421 (N.D.OH 1984), a district court case which predated all of it. Indeed, *McFaul* discussed some principles of judicial immunity without giving any justification for including a county government within its scope. It is hard to tolerate such a result, and it is incumbent on this Court to prevent the proliferation of such erroneous case law, especially when it collides with the principles clearly enunciated by this Court and by several of the federal circuits.

It took this Court only two years after *Monell* to establish that the qualified immunity defense is not available to municipalities. Surely this Court will eventually decide the same issue with respect to the other "personal" immunities, including absolute quasi-judicial immunity. In the interests of law and justice, Petitioners implore the justices of this Court to do it now.

ISSUE #2
LAW ENFORCEMENT OFFICIALS ARE NOT ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983 WHEN THEIR MANNER OF ENFORCING A COURT ORDER VIOLATES CONSTITUTIONAL RIGHTS.

The individual defendants in this case were likewise granted the protection of quasi-judicial immunity for their participation in the arrests of Plaintiffs on June 28, 1986. This is also wrong, but for different reasons.

The jurisprudence of this Court over the past twenty years makes an unbelievably sweeping blanket of immunity available to judges (and judicial officers) from §1983 liability. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Mireless v. Waco*, 502 U.S. 9 (1991). Still, judicial immunity has some limits, and state officials bear the burden of showing in a particular case that public policy requires an exemption as broad as absolute immunity. *Butz v. Economou*, 438 U.S. 478 (1978). "Absolute immunity is 'strong medicine, justified only when the danger of [officials being] deflect[ed] from the effective performance of their duties] is very great'". *Forrester v. White*, 484 U.S. 219, 230 (1988).

The unconscionable conduct of the Respondents in this case does not merit such protection, for a number of reasons. First and foremost, they violated the very Order under which they were awarded protection.[4] The Sheriff was ordered to serve the Injunction on picketers and then to arrest violators. Neither the Injunction nor the Order to the Sheriff made exceptions for enforcing the Injunction or limited its scope to pro-life protestors. Instead of enforcing the Injunction objectively, the Sheriff delegated his duty for enforcing the injunction to Planned Parenthood, a private party to a hotly contested and ideologically-driven civil lawsuit. The Sheriff then proceeded to completely subjugate himself and his deputies to the discretion of Planned Parenthood, using no independent judgment. The result was the arrests of seven individuals who had never been served with the Injunction, two individuals who were charged with no violations of the Injunction, and three others who, in fact, were not violating the Injunction. The arrests also constituted a selective prosecution which makes the blood boil (unless you work for Planned Parenthood). All such arrests were in direct violation of Judge Crush's Order to the Sheriff, and did not constitute "good faith efforts to faithfully carry out their duties" or other such verbiage as the Respondents argued below and will most certainly argue to this Court.

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[4] The Court of Appeals literally ignored the *stipulated* facts of this case when it stated that the Petitioners "have not presented sufficient evidence that the [Respondents] acted beyond the Judge's order. [Appendix at pp. 10a] In the context of a summary judgment decision where all facts were supposedly construed most favorably to the Petitioners, it is impossible to conclude that the Respondents complied with the Trial Judge's order, especially when they arrested seven people who were never served with the Injunction. Yet, both of the lower courts reached this same conclusion. Such a conclusion gives new meaning to the phrase "blind justice".

Although Court personnel and law enforcement officials executing court orders are generally entitled to absolute immunity for such "quasi-judicial" conduct, *Johnson v. Granholm*, 662 F.2d 449, 450 (6th Cir. 1981), law enforcement officials are not entitled to absolute immunity for actions not directed by court order. *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224 (1st Cir. 1990). Nor are such officials necessarily entitled to absolute immunity for the *manner* in which they carry out a judicial order:

> [A] judicial warrant contains an implicit directive that the arrest and subsequent detention be carried out in a lawful manner. Insofar as defendants exceeded legal bounds in executing the warrant for arrest, defendants have a fortiori violated the very judicial order under which they seek the shelter of absolute immunity.

Martin v. Board of County Commissioners of Pueblo County, 909 F.2d 402, 405 (10th Cir. 1990). Acting *pursuant to* a Court Order is one thing; recklessly abandoning and violating the Court's directive, and devising one's own methods to accommodate one party to a civil dispute, to the detriment of innocent victims, is quite another.

This case is a civil rights outrage of the highest order. What happened in Cincinnati, Ohio on June 28, 1986 was pure tyranny, and the Ohio courts have done everything since then to insure that these Petitioners, as members of that "currently disfavored class of antiabortion protestors", *Lawson v. Murray*, ___ U.S.___, 115 S.Ct. 2264, 132 L.Ed.2d 269, 273 (1995) (Scalia, J., concurring), would never see victory or

redress. If the contours of judicial immunity can really be stretched so far as to protect the conduct of the Respondents in this case, then it is a doctrine which has spiraled out of control, based upon "public policy" considerations with which no member of the general public agrees.

IV. CONCLUSION

For the reasons set forth above, Petitioners pray that their Petition For A Writ Of Certiorari be granted.

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Counsel For Petitioners

APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(C) Motion and proceedings thereon. The motion shall be served at least 14 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be issued on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX B

[Filed September 3, 1997]

THE SUPREME COURT OF OHIO

1997 TERM

Case No. 97-727

James J. Condit, Jr., et al.,

Appellants,

v.

Planned Parenthood Assn. of Cincinnati,

Appellee.

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. C960126)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

[Filed June 18, 1997]

THE SUPREME COURT OF OHIO

1997 TERM

Case No. 97-727

James J. Condit, Jr., et al.,

Appellants,

v.

Planned Parenthood Assn. of Cincinnati,

Appellee.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Thomas W. Condit, Esq.

(Hamilton County Court of Appeals; No. C960126)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX D

[Filed February 26, 1997]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-96-126
Trial No. A-8704811

JAMES J. CONDIT, JR., KATHY CONDIT, ROSEMARY CALLAHAN, DAVID CALLAHAN, MICHAEL O'BRIEN, NANCY O'BRIEN, WARREN SMITH, PAMELA SMITH, ANTHONY TIDWELL, SHEILA TIDWELL, MICHAEL MEYER, SARA MEYER, THOMAS SINGLETON, JASON MILLER, CYNTHIA CONKLIN, DAVID CONKLIN, TERRI CONKLIN, ROGER SPRY, DON JOHNSON, JOSEPH EDWARD MARTIN, JOHN PARKER, TERRY PARKER, JOANNE ENGEL, DANIEL ENGEL, and KATHLEEN ENGEL, a minor by Joanne Engel,

Plaintiff-Appellants,

vs.

PLANNED PARENTHOOD ASSN. OF CINCINNATI,

Defendant,

and

HAMILTON COUNTY, OHIO, HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, SIMON L.

LEIS, LINCOLN STOKES, DANIEL WOLFANGEL, DANIEL LOSITO, CITY OF CINCINNATI, LAWRENCE E. WHALEN, DONALD HUDSON, and DANIEL CAIN,
Defendants-Appellees.

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas
Judgment Appealed From is: Affirmed
Date of Judgment Entry on Appeal: February 26, 1997

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Joseph T. Deters, Prosecuting Attorney, No. 0012084, and Philip L. Zorn, Jr., Esq., No. 0018601, 125 East Court Street, Suite 300, Cincinnati, Ohio 45202, for Defendants-Appellees Hamilton County, Board of County Commissioners of Hamilton County, Simon L. Leis, Lincoln Stokes, Daniel Wolfangel, and Daniel Losito,.

Fay D. Dupuis, City Solicitor, No. 0020782, and Julie F. Bissinger, Esq., No. 0012055, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202, for Defendants-Appellees City of Cincinnati, Lawrence E. Whalen, Donald Hudson, and Daniel Cain.

PER CURIAM.

Appellants appeal the trial court's judgment granting appellees' motions for summary judgment and motions to dismiss. Because we conclude that none of appellants' assignments of error is well taken, we affirm the judgment of the trial court.

In January 1986, after Planned Parenthood Association ("Planned Parenthood") moved a clinic where abortions and other services are provided, protests at that location picked up. On March 28, 1986, Planned Parenthood filed a complaint seeking injunctive relief against various protesters. On June 20, 1986, the trial court granted a preliminary injunction which defined the class and prohibited activities. On June 27, 1986, the trial court issued an order to the sheriff concerning the enforcement of the injunction on June 28, 1986. The trial court also requested that no arrests be made unless the alleged violation was photographed and an affidavit was signed. Later on that same day, Colonel Daniel Wolfangel of the Hamilton County Sheriff's department met with attorneys representing Planned Parenthood. Wolfangel and the attorneys decided on guidelines to comply with the trial court's order on June 28. Sheriff's deputies would attempt to serve individuals with the injunction as they arrived at the site. Planned Parenthood staff members would videotape any violations and sign affidavits. On June 28, 1986, appellants were arrested for contempt of the trial court's order.

On June 26, 1987, appellants filed a complaint against appellees, Planned Parenthood, and various Planned Parenthood staff members[1], alleging violations of Section 1983, Title 42, U.S.Code. On November 25, 1987, appellants filed a motion for the recusal of Judge Thomas Crush. The motion was denied. Upon motion of the appellees, claims of ten of the appellants were dismissed.[2] Cross-motions for summary judgment were filed by the remaining parties, and the trial court granted the appellees motions for summary judgment.

In their first assignment of error, appellants state that the trial court erred in granting the appellees' motions for summary judgment. Appellants contend that neither the governmental appellees nor the individual appellees are entitled to immunity from the claims. We disagree.

It is a well-settled principle that judges are extended immunity for acting in their official capacity. This immunity is forfeited only where a judge acts in the "clear absence of all jurisdiction." *Stump v. Sparkman* (1978), 435 U.S. 349, 356-357, citing *Bradley v. Fisher* (1871), 80 U.S. 335, 20 L.Ed. 646. In this case, Judge Crush did not act beyond his jurisdiction. This immunity extends to public officials who perform "quasi-judicial" functions. *Johnson v. Granholm* (C.A.6, 1981), 662 F.2d 449. In *Doe v. McFaul* (1984), 599

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[1]Appellants' claims against the Planned Parenthood defendants were dismissed as part of a settlement of all litigation pending between appellants and Planned Parenthood.

[2]The motions to dismiss were granted as to the claims of Rosemary Callahan, David Callahan, Michael O'Brien, Nancy O'Brien, Michael Meyer, Sara Meyer, Joanne Engel, Daniel Engel, John Parker, and Terry Parker.

F.Supp. 1421, the United States District Court for the Northern District of Ohio, Eastern Division, recognized that the same rationale for judicial immunity applied to individuals "acting under the command of a court decree or explicit instructions from a judge." Id. at 1431, citing *Henriksen v. Bentley* (C.A.10, 1981), 644 F.2d 852, 855. In this case, the propriety of extending immunity is enhanced by the fact that the order at issue has been held to be valid. We also note that appellants have not presented sufficient evidence that the appellees acted beyond the judge's order.

Appellants point to dicta in *Leatherman v. Tarrant County Narcotics Unit* (1993), 507 U.S. 163, 113 S.Ct. 1160, for the proposition that absolute or qualified immunity does not extend to the governmental entities. However, that case dealt with an action instituted against a municipality for alleged Fourth Amendment violations by police officers. The court did not address the issue of immunity which attaches to individuals and entities carrying out judicial orders.

Accordingly, we conclude that based on the reasoning of *McFaul* the appellees are immune from Section 1983 liability as an extension of the judge's immunity.

We will consider appellants' next two assignments of error together. In their second assignment of error, the appellants assert that the trial court erred in not granting their motion for partial summary judgment. The third assignment of error[3] is that the trial court erred in granting appellees' motion to dismiss the claims of various appellants. Because we have

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[3]We note that in appellants' brief, their last two assignments of error are misnumbered as the fourth and fifth and assignments of error.

concluded that the trial court properly granted appellees' motions for summary judgment based on appellees' immunity from Section 1983 liability, these assignments of error are moot.

Appellants' fourth assignment of error is that the trial court erred by denying appellants' motion for recusal. Because we have concluded that the trial court properly granted the motions for summary judgment, we are unable to conclude that any of the trial court's decisions were biased. Therefore, we conclude that the trial court did not err in denying the motion for recusal. The fourth assignment of error is not well taken.

We have determined that the first and fourth assignments of error are without merit. Further, the second and third assignments of error are moot. Accordingly, the judgment of the trial court is affirmed.

HILDEBRANDT, P.J., GORMAN and SHANNON, JJ.

Judge Raymond E. Shannon, Retired from the Court of Appeals, First Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX E

[Filed January 16, 1996]

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

Case Nos. A8704811
A8801299
A8602417

(Judge Crush)

JAMES CONDIT, JR., ET AL.

Plaintiffs

v

PLANNED PARENTHOOD OF CINCINNATI, ET. AL.

Defendants

DECISION RE: MOTION
FOR SUMMARY JUDGMENT

This matter is before the Court upon motion for summary judgment filed on behalf of defendants City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain and upon motion for partial summary judgment filed on behalf of plaintiffs.

Counsel for both sides have admirably briefed applicable law. The Court does not wish to review these thorough briefs in detail here, partly because the Court has, in a series of lengthy oral and written opinions of record in these cases, aleady discussed most of the pertinent issues. Certain matters will be briefly addressed, however.

First and foremost, each of the arrests in question were carried out, by each of the arresting persons, according to the orders of this Court; and, therefore, the arresting persons benefit from the immunity of this Court.

Plaintiffs allege that the arrest procedure, as actually carried out, did not comport with the orders of this Court; and that, therefore, the arresting persons lost any immunity that might have been derived from this Court. This argument is based upon the erroneous concept that probable cause for an arrest can arise only from the personal observation of the arresting officer. This Court has pointed out in an earlier opinion (attached to defendants' motion for summary judgment) that this concept is not correct. The affidavits in this case gave the officers probable cause to make the arrests.

The real complaint, if any, that plaintiffs have is that the persons who signed the affidavits, which provided probable cause for the arrests, signed them erroneously or falsely. Whether this is true or not will never be litigated since plaintiffs have settled with these persons and dismissed them from these actions. Plaintiffs, having voluntarily removed from litigation the only persons who may have wronged them, cannot now be permitted to proceed against

persons who acted under the orders of the Court, in the manner established by the Court, and upon probable cause.

Defendants motion for summary judgment is granted; plaintiffs' motion for partial summary judgment is denied.

No attorney fees are awarded.

Counsel shall present an entry or entries, properly endorsed, granting and denying summary judgment as aforesaid on or before January 26, 1995, 9:00 A.M.

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APPENDIX F

[Filed June 20, 1986]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A8602417
(Judge Crush)

PLANNED PARENTHOOD ASSOCIATION
OF CINCINNATI, INC., et al.

Plaintiff

vs.

PROJECT JERICHO, et al.

Defendants.

PRELIMINARY INJUNCTION

Plaintiff runs a medical clinic at 3332 Vine Street, Cincinnati, OH, where a variety of services including abortions are performed. Plaintiff claims that its staff and patients have suffered injury by virtue of defendants' acts of harassment and interference which constitute a nuisance. Plaintiff seeks an order certifying a defendant class and restraining these acts of harassment. Plaintiff-intervenors are all of the tenants in the apartment building next door to the

medical clinic at one Louis Street on the Southeast corner of Louis and Vine Street.

This matter came on for hearing under Rule 65 and Rule 23 of the Ohio Rules of Civil Procedure on motions to amend an earlier preliminary injunction in this case and a motion to certif y a defendant class. Evidence and argument was heard on April 9 and June 13, 16, 17, 18, and 19, 1986.

This Court has made specific findings of fact and conclusions of law, to wit, that the picketers at and near 3332 Vine Street have blocked the sidewalk and drive of the plaintiff, created loud and disturbing noise, and created hazards with their signs on a regular basis. Such conduct has been found to constitute a nuisance and it has been determined that the conduct must be enjoined. A preliminary injunction was issued on April 4, 1986. This Court does hereby grant a modification of the injunction for the reason that plaintiff and plaintiff intervenors have established that the earlier order is ineffective in abating the nuisance caused by the protest activity at 3332 Vine Street.

WHEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED BY THE COURT THAT UNTIL THE FURTHER ORDER OF THIS COURT:

Pursuant to Rule 23(A),(B) (1) and (2), and (C) of the Ohio Rules of Civil Procedure, this action is conditionally certified as a defendant class action. The class consists of:

> Persons picketing between the Soutn curb of Louis Ave and the North curb of Shields Avenue and on

both sides of Vine Street from Louis Ave to Schields Ave who have been personally served with this order as well as their officers, acents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the order.

The representative defendants are James Condit Jr., Jonathan Brockhoeft, Ray Loekbker and Tracy Antozak. The Court finds that the class is too numerous to join each member. The defenses of the representative defendants are common factually and/or legally and typical of the defendant class. The representative defendants have no conflicts of interest with the class and they are ably represented by counsel so the class is adequately represented.

The court finds that there is a substantial risk of individual judgments being inconsistent, and that there is a risk that a judgment outside the class context could, as a practical matter be dispositive of the interests of nonparties, and that there is uniform action by class members toward the plaintiff all making appropriate injunctive relief toward the class as a whole.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

Defendant class members are hereby restrained and enjoined from doing or causing to be done, instigating, encouraging, maintaining, aiding or abetting any person in doing any of the following:

1. Screaming, chanting, speaking and singing in a manner designed, intended or having the effect of reaching the patients inside the clinic at 3332 Vine Street, Cincinnati, OH, or the tenants inside the apartment building at One Louis Street, Cincinnati, OH;

2. Screaming at patients entering or leaving the medical clinic at 3332 Vine Street, Cincinnati, OH;

3. Blocking or obstructing in any manner any driveway or pedestrian entrance areas or exit areas or the public walkway on the east side of Vine Street between Shields and Louis Streets;

4. All mass picketing, except that five picketers may be present as follows:

a. One stationary picket may be present on the public sidewalk on Louis Street as long as neither he or she nor the sign the person carries crosses over into the sidewalk area of Vine Street.

b. One stationary picket may be present on the public sidewalk on Shields Street as long as neither he or she nor the sign the person carries crosses over into the sidewalk area of Vine Street.

c. Three moving pickets, one each at the locations labeled (1), (2), and (3) on the attached diagram. Location (1) extends from the corner of Louis Avenue to the north corner of plaintiff's property. Location (2) extends from the north corner of plaintiff's property to the north side of the intersection of plaintiff's driveway with the public

walk. Location (3) extends from the south edge of plaintiff's drive to the corner at Shields Street. Those who are moving, if they wish to rest, must move completely off the east side of Vine Street between Louis Street and Shields Street.

There is no order at this time with respect to the west side of Vine street except that in all cases there may be no loud talking, chanting or praying in a voice so loud that it does reach the interior of the clinic at 3332 Vine Street or the apartments at One Louis Street.

Plaintiff shall publish this order in the Cincinnati Enquirer and the Cincinnati Post. Plaintiff shall also post a copy of this order in front of the clinic at 3332 Vine Street. This notice is only an accomodation. Official class notice is by personal service on class memebers.

No further service of this order shall be necessary on the representative defendants. For the purpose of this order "persons picketing" and a "picket" include persons present in the area referred to in this order who are carrying protest and informational signs, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion. Service of this order on such people shall be effected by the Sheriff of Hamilton County on June 21, 1986, and on such other dates as the Court directs. At all other times, service of this order may be made by a representative of the plaintiff. Service documented by videotape will be preferred. Other evidence of service will be acceptable at the option of the Court. Those serving members of the class with this order shall

request the name and address of the person served. A person refusing to accept the order shall be deemed to be served.

The Sheriff of Hamilton County may enforce the terms of this order.

The bond posted by plaintiff shall be continued and shall apply to the plaintiff intervenors as well.

SO ORDERED

Date: June 20, 1986

_____

Judge Crush

APPENDIX G

[Filed June 27, 1986]

COURT OF COMMON PLEAS
HAMLTON COUNTY, OHIO

CASE NO. A-86-02417

(Judge Crush)

PLANNED PARENTHOOD ASSOCIATION
OF CINCINNATI, INC.

Plaintiff

vs

PROJECT JERICHO, et al

Defendants

ORDER TO THE SHERIFF

The Sheriff of Hamilton County is hereby ordered to be present at the vicinity of 3332 Vine Street on Saturday, June 28, 1986, between the hours of 8:00 A.M. and 1:00 P.M. and during those hours to enforce the injunction filed herein on June 20, 1986. Said enforcement shall be by service of the order and arrest of violators, if any, upon whom the order has at any time been served. The police

department of the City of Cincinnati is equally empowered to enforce this order, and to aid the sheriff in doing so.

The sheriff may hereafter enforce this order by service and arrest at any appropriate time on any day.

_____

Thomas H. Crush, Judge

Supreme Court, U.S.
FILED
JAN 5 1998
CLERK

(2)

No. 97-961

In The

Supreme Court of the United States

October Term, 1997

JAMES J. CONDIT, JR., et al.,

Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Hamilton County Court Of Appeals First Appellate District

BRIEF OF RESPONDENTS CITY OF CINCINNATI, LAWRENCE E. WHALEN, DONALD HUDSON AND DANIEL CAIN IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether in an action brought under 42 U.S.C. Section 1983, where Petitioners fail to produce evidence of a policy or custom on the part of the municipality with respect to alleged civil rights violations, the municipality is entitled to judgment as a matter of law.

2. Whether in an action brought under 42 U.S.C. Section 1983, municipal Police Officers are entitled to qualified immunity when enforcing judicial orders.

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STATEMENT OF THE CASE

On June 20, 1986, Hamilton County, Ohio Common Pleas Judge Thomas Crush, in the case of *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho, et al.*; Case No. A-8602714, entered a Preliminary Injunction regulating picketing at the Planned Parenthood Clinic, 3332 Vine Street in Cincinnati, Ohio on June 28, 1986. (Pet. App. 15a). On June 27, 1986, Judge Crush issued an Order to the Sheriff of Hamilton County, Ohio, ordering him to enforce the injunction at the clinic. (Pet. App. 21a). This Order equally empowered the Cincinnati Police Department to enforce the injunction. On June 28, 1986, pursuant to the Court Order, numerous abortion protesters were arrested.

In the subsequent years, numerous legal actions were instituted by the abortion protestors. Several of the Plaintiffs unsuccessfully appealed their contempt convictions to the Supreme Court of Ohio. *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56 (1990). The Plaintiffs also sought to have Judge Crush disqualified due to bias and prejudice, but these allegations were found to be meritless. An attempt to have the case removed to Federal District Court also failed. *Davis v. Crush*, 646 F.Supp. 1192 (S.D.Ohio 1986).

Finally, on June 26, 1987, the Petitioners filed this action against eighteen Defendants, including the City of Cincinnati, the Chief of Police and two Cincinnati Police Officers. After several years of motions and procedural maneuvers, the parties filed for Summary Judgment in September, 1995. Subsequently, Judge Crush issued his Decision denying the Petitioners' Motion and granting

the respective Respondents' Motions for Summary Judgment. (Pet. App. 12a).

The Petitioners subsequently brought an appeal to the Hamilton County Court of Appeals First Appellate District of Ohio challenging the granting of summary judgment and requesting summary judgment on the merits. On February 26, 1997, the Court of Appeals affirmed the judgment of the trial court. (Pet. App. 6a).

Petitioners appealed to the Ohio Supreme Court. On June 18, 1997, the Ohio Supreme Court declined to accept jurisdiction of the case and dismissed the appeal as not involving any substantial constitutional question. (Pet. App. 5a). Petitioners moved for reconsideration which the Ohio Supreme Court denied on September 3, 1997. (Pet. App. 4a).

Factually, on June, 28, 1986, Cincinnati Police Officers Daniel Cain and Donald Hudson assisted Hamilton County, Ohio Sheriff's deputies in effecting the arrest of one of the Petitioners, Joseph Martin, in accordance with the June 20, 1986 Preliminary Injunction and June 27, 1986 Order to the Sheriff. The arrest of Joseph Martin was the only assistance the Cincinnati Police gave in the enforcement of the Injunction or the Order in relation to the abortion protestors. Petitioner Martin is the sole Petitioner bringing any claim against the City Respondents.

ARGUMENT

1. The City of Cincinnati is entitled to absolute quasi-judicial immunity when enforcing a valid Court Order.

Petitioner argues that the Court of Appeals erred in its decision by affirming summary judgment for the City on the grounds of quasi-judicial immunity. Petitioner argues that the Court of Appeals was wrong to grant immunity to the City as well as to the individual officers.

Petitioner cites dicta from *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993), for the proposition that absolute or qualified immunity afforded government officials is unavailable to municipal defendants. However, Petitioner misconstrues the meaning of this passage in the context of the surrounding decision. The *Leatherman* decision only held that a federal court may not apply a heightened pleading standard in civil rights cases alleging municipal liability under 42 U.S.C. Section 1983. Additionally, *Leatherman* did not address the issue presented here – whether a municipality can claim quasi-judicial immunity when its officers are sued for enforcing a valid injunction and order.

As it is clear that the officers are immune from Section 1983 liability, so too are the City and Chief Whalen. For example, in *Doe v. McFaul*, 599 F.Supp 1421 (1984), having found that the sheriff, jail personnel and other individuals responsible for implementing the judicial orders were immune, the District Court concluded:

> It follows logically that the remaining defendants – the County, the Commissioners, and Judge Spellacy – cannot be subject to liability for

> their failure to overrule, countermand, challenge, or otherwise interfere with Judge Harris' facially valid order. Plaintiffs point to no case law supporting the proposition that a state official violates the Constitution or civil rights statutes by failing to attack a state court judgment.

Id. at 1432.

In the instant case, Officers Cain and Hudson were present at the Planned Parenthood Clinic pursuant to the Court Order. Consequently, the officers, acting to enforce a valid order, which has been upheld by the Ohio Supreme Court as a valid time, place and manner restriction, are entitled to absolute immunity, and logically, the City and the Chief of Police, are similarly entitled to absolute immunity.

Additionally, Petitioner is unable as a matter of law to establish the requisite elements for liability under 42 U.S.C. Section 1983 for both the City and the individual Defendants. In *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), this Court held that municipalities may be liable for constitutional injuries caused only by an official policy or custom. In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), this Court held that a single act by a low level official was an insufficient basis to infer the existence of a municipal policy. In so holding, this Court indicated that *Monell* intended to prevent municipal liability except in situations where a claimed wrong could be attributed to municipal decision makers. *Id.* at 823-824. Thereafter, in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), this Court held that municipal liablility attaches only where a deliberate choice to follow a course of action is made

from among various alternatives by the official responsible for establishing final policy. In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), this Court considered the issue of identifying municipal policy makers for purposes of Section 1983 liability. This Court held that the identification of the person with the authority to make final policy is a question of state or local law and not a question for the jury. *Id.* at 124-125.

In determining the policy maker for the City of Cincinnati Police Division, it is necessary to look at the City Charter and the Administrative Code. *Fisher v. City of Cincinnati*, 753 F.Supp. 681 (S.D. Ohio 1990), is instructive. In that case, a plaintiff sued, among others, the City of Cincinnati, the Police Chief and other officers under Section 1983. *Id.* at 689. The District Court, analyzing the Supreme Court cases cited above herein, identified who has "final" policy making authority in the City of Cincinnati Police Division stating:

> [Police Chief] Whalen . . . though charged with supervising and executing the City's policies or customs, do[es] not possess the authority to make "final" policy as defined in *Praprotnik*.

Id. at 689. Rather, as the City Charter and the Administrative Code make patently clear, final policy making authority in the Police Division rests with the City Manager and City Council. *Id.* at 689.

In Petitioner's Complaint, however, there was no mention of the City Manager or the City Council. Without an allegation that the individuals who have final policy making authority were involved in the alleged unconstitutional policy, liability cannot attach under Section

1983. Also, liability attaches "only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that police misconduct is almost inevitable . . . or would be properly characterized as substantially certain to result." *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982). Instead of imposing liability based on respondeat superior or negligence, which is unquestionably improper under *Monell* and its progeny, in order to impose liability on the municipality based on inadequate training or supervision, "[t]he courts look for some proof that a defendant has a culpable state of mind – that the action or failure to act was to some degree deliberate rather than inadvertent." *Id.* at 873. It is obvious that the Second Amended Complaint did not allege such facts as to show this conduct on behalf of the municipal policy maker when the Complaint did not even allege that the individuals who have final policy making authority, the City Manager and the City Council, were involved in any way in the policy.

Additionally, the Complaint does not assert that the so called policy of insufficient training and supervision was in any way the "moving force" of the constitutional deprivation. *Monell*, 436 U.S. at 694; and *Tuttle*, 471 U.S. at 823, n.7. This Court addressed the issue of whether an allegation of inadequate supervision and training was the moving force behind alleged Section 1983 violations. *Id.* at 823, n.7. This Court made it clear that merely alleging inadequate supervision and training will not suffice to impose Section 1983 liability; rather, the plaintiff must prove, among other things, that the inadequate training caused the plaintiff's injuries. *Id.* at 823, n.7.

If anything was a "moving force" in this case, it was the Court Order which put Officers Hudson and Cain at the scene, not some nonexistent policy of inadequate training and supervision. In this regard, *Bachelier v. Hamilton County*, No. C-1-89-607 (S.D. Ohio, July 26, 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991), is dispositive. In *Bachelier*, the District Court held that some of the abortion protestors who were arrested for violating the court order could not succeed on their Section 1983 claims, *inter alia*, because under *Monell* and its progeny, the enforcement of the facially valid court order was not the moving force of any of the alleged constitutional violations. The District Court reasoned:

> Judge Crush is a state official rather than a policy-maker for the city or county, [citation omitted], and therefore, any policy adopted by Judge Crush through his injunction cannot form the basis for liability of the City and County.

Id. at 893.

In addition, this Court has consistently stated that a single incident, without a supporting history, is inadequate to infer a municipal policy. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989); and *Tuttle*, 471 U.S. at 820. Clearly, Officers Cain's and Hudson's actions, in assisting Hamilton County Sheriff's deputies in the arrest of Petitioner Martin, constituted such a "single incident." In *Tuttle*, this Court refused to allow Section 1983 liability on the theory that a municipal police force's "policy" of training and supervising was the "policy" that resulted in inadequate training, and therefore, the constitutional violations alleged. *Id.* at 820. This theory, very similar to the

theory relied upon by Martin in his Complaint, is especially improper when an inference of such a policy is allowed by the mere existence of a single incident. *Id.* at 820-821. The lower federal courts have applied this rule on many occasions to claims that allegedly wrongful acts by police officers can form the basis of a municipal policy sufficient for Section 1983 liability. *See, e.g., McKee v. City of Rockwall,* 877 F.2d 409, 415-416 (5th Cir. 1989).

Martin cannot offer this Court a scintilla of evidence that City officials deliberately chose a training program alleging specific facts which would support the allegations in the Complaint. *See Monell,* 436 U.S. at 691-694. In this regard, this Court's analysis in *Tuttle* is persuasive. This Court, in dismissing the plaintiff's claim that the " 'policy', of 'inadequate training' " was the cause of her husband's death from a police shooting, stated:

> [I]t is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice – that is, proof that the policymakers deliberately chose a training program which would prove inadequate.

Tuttle, 471 U.S. at 823.

Petitioner cannot simply rely on broad and conclusory allegations in the Complaint. As this Court has held, in order to be actionable, the failure to train must amount "to deliberate indifference to the rights of persons with whom the police come into contact." *Harris,* 489 U.S. at 389.

Instructive are some cases relying upon *Harris* which set forth the proper pleading requirements imposed on plaintiffs seeking to establish inadequate training and supervision liability. *See Weber v. Village of Hanover Park*, 768 F.Supp. 630 (N.D. Ill. 1991), and cases cited therein. In *Weber*, the court granted the defendant's motion to dismiss the plaintiffs' Section 1983 claim, reasoning that although the plaintiffs had "pleaded the 'catch words' from *Harris* – 'failure to properly train' and deliberate indifference' – they have failed to support these conclusory, boilerplate allegations with any facts about the Village's training program or how that training program caused their injuries." *Id.* at 640. Similarly in this case, Petitioner has not raised any facts which would establish an inadequate training program or that such a program was the cause of his injuries. Because Officers Hudson and Cain were acting pursuant to the Court Order, they are obviously not liable for the alleged non-physical injuries.

Since the Complaint omitted facts which were crucial to recovery, an assumption that those facts do not exist is reasonable. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir. 1988), where the court stated, "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *Id.* at 437. This is not to say that Respondents suggest Petitioner must meet a heightened pleading standard as prohibited by *Leatherman*, 507 U.S. at 163. Instead, as indicated by this Court's recent cases on municipal liability, courts must rely on summary judgment and control of discovery to weed out unmeritorious Section 1983 claims against municipalities. *Id.* at 166.

The legal basis of Petitioner's claim is clearly without merit. Because the law is so clearly against Martin's claims, and because Petitioner has failed to establish any material fact which would entitle him to a trial on the merits, judgment was properly granted to Respondents as a matter of law.

2. Individual Police Officers are entitled to absolute quasi-judicial immunity when enforcing judicial orders.

Petitioners again mischaracterize the actions of the Police Officers and Sheriff's deputies in enforcing Judge Crush's Order. The Sheriff [and officers] did not as Petitioners would suggest "completely subjugate himself and his deputies to the discretion of Planned Parenthood, using no independent judgment." (Petition, p. 16).

The Court of Appeals noted that Petitioners had not presented sufficient evidence that Respondents acted beyond the judge's order. The officers in this case did not "recklessly [abandon] and [violate] the Court's directive, and [devise their] own methods to accommodate one party to a civil dispute, to the detriment of innocent victims," (Petition, p. 17), but were merely diligent public servants thrust into a hotly contested and ideologically-driven lawsuit to enforce a valid judicial order.

Officers Cain and Hudson were present at the Planned Parenthood Clinic pursuant to a valid Court Order subsequently upheld by the Ohio Supreme Court.

They are therefore entitled to absolute quasi-judicial immunity in enforcing the order.

CONCLUSION

For the foregoing reasons, Respondents City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U. S.
F I L E D
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CLERK

No. 97-961

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JAMES CONDIT, JR., et al.,
Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE HAMILTON COUNTY COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

BRIEF OF RESPONDENTS HAMILTON COUNTY, OHIO; BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO; LINCOLN STOKES; SIMON L. LEIS, JR.; DANIEL WOLFANGEL; AND DANIEL LOSITO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED

I. DOES THIS COURT HAVE JURISDICTION TO GRANT THE WITHIN PETITION FOR A WRIT OF CERTIORARI?

II. ARE COUNTY LAW ENFORCEMENT OFFICERS WHO EXECUTE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR OFFICIAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, AND THE COUNTY WHICH EMPLOYS THOSE OFFICERS, ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT?

III. ARE COUNTY LAW ENFORCEMENT OFFICERS WHO EXECUTE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR INDIVIDUAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellants: JAMES J. CONDIT, JR., KATHY CONDIT, ROSEMARY CALLAHAN, DAVID CALLAHAN, MICHAEL O'BRIEN, NANCY O'BRIEN, WARREN SMITH, PAMELA SMITH, ANTHONY TIDWELL, SHEILA TIDWELL, MICHAEL MEYER, SARA MEYER, THOMAS SINGLETON, JASON MILLER, CYNTHIA CONKLIN, DAVID CONKLIN, TERRI CONKLIN, ROGER SPRY, DON JOHNSON, JOSEPH EDWARD MARTIN, JOHN PARKER, TERRY PARKER, JOANNE ENGEL, DANIEL ENGEL, and KATHLEEN ENGEL, a minor by Joanne Engel.

Defendants-Appellees: HAMILTON COUNTY, OHIO; BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO; SIMON L. LEIS, JR.; LINCOLN STOKES; DANIEL WOLFANGEL; DANIEL LOSITO; CITY OF CINCINNATI, OHIO; LAWRENCE E. WHALEN; DONALD HUDSON; AND DANIEL CAIN.

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JURISDICTION

Judge Thomas Crush of the Hamilton County (Ohio) Court of Common Pleas entered his decision on the parties' cross-motions for summary judgment on January 16, 1996 (see Appendix E to petitioners' within petition for a writ of certiorari, hereinafter the "petition"), and his final judgment on January 25, 1996. The Hamilton County Court of Appeals, First Appellate District of Ohio, affirmed the judgment on February 26, 1997 (see Appendix D to the petition). The Supreme Court of Ohio declined to exercise jurisdiction of petitioners' appeal and denied review of the judgment of the court of appeals on June 18, 1997 (see Appendix C to the petition), and denied petitioners' motion for reconsideration on September 3, 1997 (see Appendix B to the petition).

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." In light of the considerations enumerated in Rule 10, this Court does not have jurisdiction to grant the within petition, and thus the petition must be denied. In addition, respondents state that there is no compelling reason for the petition to be granted.

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE.

Petitioners herein (plaintiffs below) filed their complaint in the underlying case (James J. Condit, Jr., et al v. Planned Parenthood Association of Cincinnati, et al.) on June 26, 1987, in the Hamilton County (Ohio) Court of

Common Pleas. The case was assigned to Common Pleas Court Judge Thomas Crush. As a matter of law, judges of a Court of Common Pleas in Ohio are, for 42 U.S.C. §1983 purposes, considered to be state, not county, officials.

Petitioners' complaint was later amended twice. Defendants below included:

1. Hamilton County, Ohio; the Board of County Commissioners of Hamilton County, Ohio (Hon. Guy C. Guckenberger, Hon. John Dowlin and Hon. Robert Bedinghaus); Hon. Simon L. Leis, Jr., the Hamilton County Sheriff; deputy sheriff Col. Wolfangel; deputy sheriff Daniel Losito (the "County defendants", and respondents herein);

2. City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain (the "City defendants", and respondents herein); and

3. Planned Parenthood Association of Cincinnati, Inc., Ann Mitchell, Robert Hatfield, Lynn Estomin, Robert Laufman, Timothy Black and Phil Bonham (the "Planned Parenthood defendants").

The action was filed pursuant to 42 U.S.C. §§1983 and 1985, and state tort law. The gist of the second amended complaint was that respondents violated petitioners' civil and other legal rights when, pursuant to a direct order issued to respondent Sheriff by Judge Crush in another case (**Planned Parenthood v. Project Jericho**) to enforce his injunction in that case regulating abortion protests, respondents arrested petitioners on June 28, 1986, for protesting in violation of the injunction.

All defendants filed respective motions to consolidate the two cases, which Judge Crush granted. Shortly thereafter,

petitioners filed a motion for Judge Crush to recuse himself from the cases, which motion was denied.

Subsequently, all the defendants in the cases filed motions to dismiss under Civ. R. 12(b)(6). The trial court did not dismiss the case as to all claims, but it did grant the dismissal as to certain plaintiffs in regard to certain claims, to-wit: Rosemary and David Callahan, Michael and Nancy O'Brien, Michael and Sara Meyer, Joanne and Daniel Engel and John and Terry Parker, with regard to Causes of Action nos. 1, 2, 3, 5, 6, 8, 9, 12, 13 and 14.

Ultimately, cross-motions for summary judgment were filed, and the parties jointly filed certain stipulations. Respondents' motion for summary judgment was based on five (5) separate grounds: 1) absolute quasi-judicial immunity on all claims; 2) Eleventh Amendment immunity on the federal claims; 3) qualified immunity on the federal claims; 4) lack of an actionable county policy or custom on the federal claims; and 5) statutory immunity on the state law claims.[1]

---

[1] The second ground for the motion, the Eleventh Amendment immunity argument, was withdrawn by the County defendants on appeal as inapplicable in a state court proceeding. **Will v. Michigan Dep't. of State Police**, 491 U.S. 58, 63-64 (1989), quoting **Maine v. Thiboutot**, 448 U.S. 1, 9, n. 7 (1980). In its place, respondents attempted to argue what they should have argued in the first place; namely, that, in executing the order of a state court judge, the county law enforcement officers were acting as agents of the state, and not of the county; therefore, as a matter of law, plaintiffs' official capacity §1983 suit against them must be treated as a suit against the State of Ohio, and not as a suit against Hamilton County; however, a state is not a "person" within the meaning of that term as it is used in 42 U.S.C. §1983; and thus, since §1983 only operates to

On January 16, 1996, Judge Crush issued his decision in the case denying the petitioners' motion for partial summary judgment and granting the respondents' motions for summary judgment. Judge Crush apparently granted the respondents' motions for summary judgment solely on the ground of absolute quasi-judicial immunity from suit on all claims. See the trial court's decision, appended to petitioner's within petition as Appendix E. On January 25, 1996, Judge Crush entered final judgment in the matter. On February 23, 1996, petitioners appealed to the Hamilton County Court of Appeals, First Appellate District of Ohio, which affirmed the judgment of the trial court on February 26, 1997. Again, despite respondents arguing all of their other grounds for summary judgment to the court of appeals, the court of appeals appeared to affirm solely on the ground of absolute quasi-judicial immunity from suit on all claims. See the court of appeals' decision, appended to the petition as Appendix D. On April 14, 1997, petitioners appealed to the Supreme Court of Ohio, which declined jurisdiction on June 18, 1997. See

---

redress the actionable conduct of a "person", plaintiffs' federal claims against Hamilton County, and against the other County defendants in their official capacities, brought pursuant to §1983 (i.e., plaintiffs' §1983 claims against the state), cannot be maintained. **Will**, **supra**; **Pusey v. City of Youngstown**, 11 F.3d 652 (6th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 2742 (1994); **Scott v. O'Grady**, 975 F.2d 366 (7th Cir. 1992), cert. denied __ U.S. __, 113 S.Ct. 2421 (1993); **Echols v. Parker**, 909 F.2d 795 (5th Cir. 1990); **Association for Children for Enforcement of Support, Inc., et al. v. Ronald Panioto, et al.**, No. C-1-85-1219 (S.D. Ohio Dec. 18, 1986, J. Spiegel; unreported; copy of case located at Appendix A of this brief); **Bachelier, et al. v. Hamilton County, et al.**, No. 90-3725 (6th Cir. April 30, 1991; unreported; copy of case located at Appendix B of this brief).

the Supreme Court of Ohio's entry, appended to the petition as Appendix C. On June 28, 1997, petitioners filed a request for reconsideration, which the Supreme Court of Ohio denied on September 3, 1977. See the Supreme Court of Ohio's reconsideration entry, appended to the petition as Appendix B.

Petitioners filed their within petition for a writ of certiorari on December 2, 1997, and it was placed on the docket on December 10, 1997.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

The following facts were in the record before all of the lower courts.

In January of 1986, Planned Parenthood Association of Cincinnati, Inc. ("Planned Parenthood") moved The Margaret Sanger Center, a clinic where abortions and other medical services were provided, to 3332 Vine Street in Cincinnati, Ohio. Shortly thereafter, the number of protestors picketing against abortion each week increased significantly.

On March 26, 1986, Planned Parenthood filed a complaint in the Hamilton County Court of Common Pleas against Americans Against Abortion, Right to Life of Greater Cincinnati, Inc., Jericho Project, Tracy Antczak, Jonathan Brockhoeft, Raymond Loebker, and petitioner James Condit, Jr. (**Planned Parenthood v. Project Jericho**). The lawsuit was assigned to Hamilton County Common Pleas Court Judge Thomas Crush, and it sought injunctive relief, alleging that the named defendants and other unnamed persons had engaged in a variety of tortious acts. The parties to this case were all private parties, and there were no Hamilton County agencies,

boards, officials, employees, agents or other representatives who were parties. Hearings on Planned Parenthood's request for an injunction were held in March and April, 1986, during which time Planned Parenthood filed an amended complaint with class action allegations and a motion to certify a defendant class.

On June 20, 1986, Judge Crush granted Planned Parenthood's second motion to amend the complaint and the motion to certify a defendant class. Judge Crush issued a six-page preliminary injunction (hereinafter "the injunction") defining the class and setting out the prohibitions for defendant class members. A true and accurate copy of the injunction is appended to petitioners' within petition as Appendix F.

Respondent Daniel Wolfangel ("Wolfangel") is a duly appointed, qualified and acting deputy sheriff of Hamilton County, Ohio, and has held that position continuously since prior to 1986.

In June of 1986, Wolfangel held the rank of colonel in the Hamilton County Sheriff's Office, and was serving as the commander of the Sheriff's Court Services Division. Service and enforcement of court orders were functions of his division.

On the morning of Friday, June 27, 1986, Wolfangel was present at a hearing that Judge Crush held in the case wherein the judge stated, among other things, that he intended to issue an order to the Sheriff concerning enforcement of the injunction on Saturday, June 28, 1986. Judge Crush stated further that he was going to require all of the following things to occur before an individual could be arrested by the Sheriff for violation of the injunction: service of the injunction by

the Sheriff on the individual; videotaping by Planned Parenthood of the individual's subsequent violation(s); and an affidavit, to be "signed on the spot by someone who knows the facts", and delivered to the Sheriff, charging the individual with the violation(s).

Later that day, Judge Crush issued an "Order To The Sheriff" in the case ("the order"), which ordered the Hamilton County Sheriff to be present at the vicinity of 3332 Vine Street Cincinnati, Ohio (the vicinity of the Margaret Sanger Center) the next day, Saturday, June 28, 1986, between the hours of 8:00 A.M. and 1:00 P.M., and during those hours to enforce the injunction by service of it and arrest of violators, if any, upon whom it had at any time been served. The order further authorized such enforcement at any appropriate time on any day. A true and accurate copy of the order is appended to petitioners' within petition as Appendix G.

As commander of the Sheriff's Court Services Division, it was Wolfangel's responsibility to plan, coordinate and oversee compliance with the order and enforcement of the injunction, subject to the superior authority of the Chief Deputy Sheriff and/or the Sheriff.

At no time between the issuance of the order on Friday, June 27, 1986, and 8:00 A.M. on Saturday, June 28, 1986, did the attorneys for the defendants in the case ever attempt to contact Wolfangel or any other representative of the Sheriff's Office to discuss the order, the Sheriff's intended manner of compliance with it, enforcement of the injunction, or any other matter.

At some point on Friday, June 27, 1986, after Judge Crush had issued the order, plaintiff's (i.e., Planned Parenthood's) attorneys came to Wolfangel's office to discuss

and coordinate compliance with the order and enforcement of the injunction. It was felt that the only way to properly comply with the order and to enforce the injunction would be to follow Judge Crush's verbal requirements stated in open court earlier that day (and as set forth hereinabove) as closely as possible, to wit: for the deputies on site to attempt to serve all persons in the area with a copy of the injunction as they arrived; thereafter, for Planned Parenthood staff to determine who of those served, if anyone, was violating the injunction, and to videotape those violations(s); thereafter, for the Planned Parenthood staffer who observed and determined the violation(s) to execute an affidavit charging the violator with the violation(s), and to deliver the affidavit to a representative of the Sheriff's Office; thereafter, for the Sheriff or a deputy to effect the arrest of the violator so charged on the basis of the Planned Parenthood staffer's affidavit. Wolfangel's understanding of Judge Crush's verbal requirements and written order was that the Sheriff's sole responsibilities thereunder were: 1) to serve the injunction; and 2) to arrest violators of it, if any, upon whom the injunction had been served. Wolfangel further understood Planned Parenthood's responsibilities to be: 1) to determine and videotape any violations; 2) to execute an appropriate affidavit charging an individual with any violations(s) committed; and 3) to deliver such affidavit to the Sheriff as the basis for the arrest of the violator(s). Planned Parenthood's attorneys brought with them for Wolfangel numerous photocopies of the injunction to be used for service the next day, and a copy of the preprinted form "Affidavit Charging Contempt" which they intended to use, and did in fact use, on June 28, 1986. The form affidavit appeared to Wolfangel to conform to what Judge Crush required of such an affidavit.

At no time during this meeting was either observance or violation of injunction violators' civil rights discussed.

This was due to the fact that it was Wolfangel's sincere and educated belief then, as it still is today, that the plan discussed above for compliance with the order and enforcement of the injunction was completely legal, in conformity with what Judge Crush ordered, appropriate, and not in any way in violation of anyone's, including petitioners', constitutional, civil or other legal rights. He can only assume, and he therefore does assume, that this belief was shared by Planned Parenthood's attorneys.

At no time did Wolfangel feel any legal, civil, political, religious or other animosity toward those who were protesting against abortion at the Margaret Sanger Center, including any of the within petitioners. At no time did he have any desire or intention whatsoever to infringe upon, limit or otherwise violate any of their constitutional, civil or other legal rights; to cause, facilitate, or ratify such violations by others; or to participate with others in any way in such violations. At no time did he feel that his conduct or that of any of the other respondents infringed upon, limited or otherwise violated any of the injunction violators' constitutional, civil or other legal rights. Thus, at no time did Wolfangel ever discuss, plan, conspire or otherwise collaborate with anyone else regarding commission of such violations.

Wolfangel's only desire at any time relevant to petitioners' within complaints was to fully, faithfully and properly do his job for the Sheriff by fully, faithfully and properly complying with the trial court's order to the Sheriff for enforcement of the injunction.

On Saturday, June 28, 1986, respondent Sheriff Stokes, Chief Deputy Sheriff Victor Carrelli, Wolfangel and several other deputy sheriffs, including respondent Losito,

were on site at the vicinity of 3332 Vine Street as ordered by Judge Crush. All Sheriff's personnel on site had been fully trained as Ohio Peace Officers, and had been certified as such by the Ohio Peace Officers' Training Council pursuant to Ohio Revised Code ("RC") §109.77.

All Sheriff's deputies on site were instructed that compliance with the order and enforcement of the injunction would follow the procedure outlined hereinabove, and all were ordered to follow that procedure. All deputies were reminded of their duty to comply with the existing Sheriff's Office policy that only the minimum amount of force necessary was to be used in making an arrest (*i.e.*, only such force as was necessary and reasonable to effect the arrest, and no more).

Thereafter, deputies were instructed first to serve copies of the injunction on all who arrived on site, and thereafter to arrest only those who had been served, and against whom a Planned Parenthood staffer had executed an "Affidavit Charging Contempt".

Well over 100 abortion protestors arrived at the vicinity of 3332 Vine Street between the hours of 8:00 A.M. and 10:00 A.M. Service upon all was attempted and, Wolfangel believes, accomplished. The protestors were very verbal and noisy, and the atmosphere they created was very hostile, confrontational and tense. Based upon their behavior, Wolfangel believed violence on their part was probable, as did the other deputies on site. Planned Parenthood staffers videotaped the protest activity.

Shortly after 10:00 A.M., several speeches were delivered by certain of the protestors to the rest of the crowd on the west side of Vine Street, across the street from the

Margaret Sanger Center. After these speeches, several people, including the petitioners herein, crossed Vine street to spots directly in front of the Sanger Center. During the next hour or so, Planned Parenthood staffers continued to videotape the protestors' activity, and a Planned Parenthood staffer executed affidavits charging certain individuals, including petitioners herein, with contempt for violation of the injunction. These affidavits were then delivered to Sheriff's personnel by Planned Parenthood personnel, and all violators, including all petitioners herein, were then arrested on the basis of the Planned Parenthood staffer's sworn affidavits.

To the best of Wolfangel's knowledge at that time, all who were arrested on June 28, 1986, had first been served with a copy of the injunction and had their violation(s) videotaped, and were thereafter arrested pursuant to an "Affidavit Charging Contempt", which affidavit was executed by a Planned Parenthood staffer. Indeed, the typed portion of the affidavit was identical for all of the petitioners herein, and clearly stated that the violator had first been served with a copy of the injunction, and that he or she had thereafter violated the injunction. Those arrested were thereafter transported to the Hamilton County Justice Center or the Hamilton County Youth Detention Center, and were held therein until the conditions for their release, set by Judge Crush, had been met.

The Sheriff's Office had every desire, and made every attempt, to faithfully and properly comply with Judge Crush's "Order To The Sheriff", and to enforce the injunction in a legal and proper manner. To the best of Wolfangel's knowledge at that time, this was accomplished. However, it later was determined that service of the injunction on petitioners Tidwell, Miller, Taylor, Spry, C. Conklin, D. Conklin and Engel was not videotaped, and thus could not

be verified at their contempt hearings, and that petitioners Davis and Johnson were arrested pursuant to signed affidavits which charged that they had committed a violation or violations of the injunction, but which did not specify the exact nature of the violation(s) they had committed.

Ultimately, Judge Crush dismissed the contempt charges against all petitioners.

ARGUMENT

ISSUE #1. THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE WITHIN PETITION FOR A WRIT OF CERTIORARI.

Rule 10 of the Rules of the Supreme Court of the United States provides, in relevant part, that "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 goes on to enumerate the considerations governing review on certiorari, the only ones relevant to this proceeding being when:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals; [or]
>
> (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In this case, the "state court of last resort" in Ohio, i.e., the Ohio Supreme Court, did not accept jurisdiction of

petitioners' appeal, and thus did not decide anything. Even if this Court construes the term "court of last resort" to include the Hamilton County Court of Appeals, First Appellate District of Ohio, that court did not decide "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals". Accordingly, this Court would not have jurisdiction over the within petition under consideration (b) of Rule 10.

Furthermore, the highest Ohio state court that has decided this case, i.e., the Hamilton County Court of Appeals, First Appellate District of Ohio, has neither "decided an important question of federal law that has not been, but should be, settled by this Court", nor has it "decided an important federal question in a way that conflicts with relevant decisions of this Court". Thus, no jurisdiction would lie under consideration (c) of Rule 10.[2]

Additionally, there are no compelling reasons to grant the petition in this case. This case merely involves: 1) the arrest of petitioners by respondents, pursuant to an express court order to respondents, issued by a state court judge, to enforce his injunction by arresting anyone who violated the injunction after first having been served with a copy of it, and 2) the resulting grant of absolute quasi-judicial immunity to the respondents for their compliance with the order. Judge

---

[2] The First Appellate District of Ohio is comprised solely of Hamilton County, Ohio. Thus, decisions of the Hamilton County Court of Appeals, First Appellate District of Ohio, are binding only in Hamilton County, Ohio. Ohio Constitution, Article IV, §3; **Linkensdorfer v. Wentzel**, 4 ONP 94, 6 O.Dec. 6; **Kings Powder Co. v. Thrasher**, 20 ONP NS 401, 28 O.Dec. 356; 23 O.Jur.3d, Courts and Judges, §515.

Crush required that the arrests be based upon the sworn affidavit of someone at the scene with personal knowledge of the service of the injunction on the arrestee, and of the arrestee's subsequent violation of it. The respondents' arrest conduct in response to Judge Crush's order was evaluated by the lower courts and found to be in full compliance with the order (see Appendix E to the petition, at page 13a of the appendix, the trial court's decision on summary judgment: "...First and foremost, each of the arrests in question were carried out, by each of the arresting persons, according to the orders of this Court; and, therefore, the arresting persons benefit from the immunity of this Court...")

The trial court went on to correctly identify petitioners' real complaint in the action:

> "...The real complaint, if any, that plaintiffs have is that the persons who signed the affidavits, which provided probable cause for the arrests, signed them erroneously or falsely. Whether this is true or not will never be litigated since plaintiffs have settled with these persons and dismissed them from these actions. Plaintiffs, having voluntarily removed from litigation the only persons who may have wronged them, cannot now be permitted to proceed against persons who acted under the orders of the Court, in the manner established by the Court, and upon probable cause..." **Id.**, at 13-14.

On appeal, the court of appeals reviewed and upheld the trial court's factual findings regarding the respondents' compliance with the trial court's order:

> "...In this case, the propriety of extending immunity is enhanced by the fact that the order at issue has been held to be valid. We also note that appellants have not presented sufficient evidence that the appellees acted beyond the judge's order..."

(See Appendix D to the petition, at page 10a of the appendix, the court of appeals decision.)

Rule 10 of this Court's rules concludes by stating that "...A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law..." And, the within petition, in effect, if not in so many words, asserts both.

Accordingly, respondents respectfully submit that this Court has no jurisdiction to grant the petition, and thus that the petition must be denied.

ISSUE #2. COUNTY LAW ENFORCEMENT OFFICERS WHO ENFORCE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR OFFICIAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, AND THE COUNTY WHICH EMPLOYS THOSE OFFICERS, ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT.

On page 12 of their within petition, petitioners state that counties and cities whose policy makers enforce valid state court orders are not entitled to absolute quasi-judicial immunity from suit pursuant to 42 U.S.C. §1983 for so doing, but then immediately concede that "...[this Court] has

never addressed (as an actual holding of a case) the availability of absolute quasi-judicial immunity to cities and counties whose agents enforce a court order..."

Nevertheless, appellants rely heavily on the case of **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, 507 U.S. 163 (1993), as authority that Hamilton County is not entitled to absolute quasi-judicial immunity from suit herein. However, as scrutiny of the **Leatherman** decision reveals, the case conclusively determines only one thing: *i.e.*, that a federal court may not apply a "heightened pleading standard" - one more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure - in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. This is the entire holding of the case. **Leatherman**, 507 U.S., at 164. Thus, **Leatherman** is completely inapposite to the instant case.

As this Court noted in **Leatherman**, at 507 U.S., at 166, the respondents in that case claimed:

> "...that municipalities' freedom from *respondeat superior* liability...necessarily includes immunity from suit. In this sense, respondents assert, municipalities are no different from state of local officials sued in their individual capacity..." (Emphasis added.)

Simply put, the respondents have never taken either of these positions in the instant case, and thus **Leatherman** is factually inapposite to the instant case.

Furthermore, the instant case is not one in which the

respondents, in their official capacities, have attempted to claim qualified immunity. They are well aware that county officials, in their official capacities (and thus counties themselves) are not entitled to the defense of qualified immunity.[3]

Thus, the vast majority of the dicta from **Leatherman** has absolutely no application to the instant case. In this dicta, this Court merely noted that when it last revisited the question of whether municipalities are entitled to some form of "limited" immunity (*i.e.*, in the case of **Owens v. City of Independence**, 445 U.S. 622 (1980)), it did so solely in the context of having to decide whether municipalities were entitled to qualified immunity:

> "...in **Owens**...we rejected a claim that municipalities should be afforded qualified immunity, much like that afforded individual officers, based on the good faith of their agents..." **Leatherman**, 507 U.S., at 166.

Since the instant case has never involved a claim of qualified immunity for the appellees in their official capacities, or for Hamilton County itself, this dicta has no relevance herein whatever.

Yet, in fairness, the dicta quoted by petitioners on pages 13 and 14 of their petition, does go on to say:

"...These decisions [**Owens**, *supra*, **Monroe**

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[3] The respondents did, of course, assert below qualified immunity from suit in their individual, personal capacities, but not in their official capacities.

> v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)] make it quite clear that...municipalities do not enjoy immunity from suit - either absolute or qualified -under § 1983..." In short, a municipality can be sued under §1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury..." Id.

However, this dicta is neither controlling nor persuasive. Monroe was a very early decision which had baldly held that municipalities were, as the Supreme Court phrased it in Leatherman (507 U.S. at 166), "wholly immune" from suit under § 1983. In overruling Monroe by holding that municipalities could be sued under § 1983, the Monell Court was not confronted, and thus did not deal, with the either the concept or the issue of absolute quasi-judicial immunity. To be more specific, neither Monroe, Monell nor Owens involved the issue which is present in the instant case: *i.e.*, whether a municipality is entitled to absolute quasi-judicial immunity when its officers are sued in their official capacities for doing nothing more than obeying the facially valid order of a state court judge.[4] Thus, those three cases, and

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[4] An Ohio Common Pleas Court Judge is a state not a county official for purposes of liability under 42 U.S.C. §1983. Association for Children for Enforcement of Support, Inc. v. Panioto, Case No. C-1-85-1219, United States District Court, Southern District of Ohio, J. Spiegel, Dec. 18, 1986 (unreported; copy appended hereto as Appendix A); Bachelier, et al. v. Hamilton County, et al., Case No. 90-3725, United States Court of Appeals for the Sixth Circuit, April 30, 1991, p.

Leatherman itself, are all clearly inapposite to the case at bar.

Most importantly, "...[A] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority...", **Stump v. Sparkman** (1978), 435 U.S. 349, 356-357. And, "[I]t is well settled that judicial immunity which has historically protected judges acting in their official capacity ... also attaches to public officials who perform quasi-judicial duties." **Johnson v. Granholm**, 662 F.2d 449 (6th Cir. 1981), cert. denied, 457 U.S. 1120 (1982). Furthermore, as previously noted, the lower courts herein have specifically found that respondents complied faithfully with the enforcement procedure specifically set forth by Judge Crush in open court, and in his "Order to the Sheriff".

Thus, even if this Court were to find Judge Crush's order to be unconstitutional, the respondents would still be entitled to and protected by absolute quasi-judicial immunity. See **Mireles v. Waco** (1991), 502 U.S. 9 (absolute quasi-judicial immunity granted to all defendants despite the police officer defendants faithfully obeying a state court judge's explicit order to "forcibly and with excessive force seize and bring [the attorney/plaintiff] into this courtroom"; emphasis added). In **Doe v. McFaul**, 599 F.Supp. 1421 (N.D. Ohio 1984), Doe, the United States District Court applied the doctrine of quasi-judicial immunity to facts analogous to the case at bar. There, plaintiffs filed an action under 42 U.S.C. §1983 against Cuyahoga County (Ohio) and the Cuyahoga County sheriff, alleging that defendants followed and enforced an unconstitutional court order. Specifically, defendants in

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6 (unreported; copy appended hereto as Appendix B, citing **Panioto**).

Doe followed a court order requiring the incarceration of a minor in a regular correctional facility designed for adults. Although the court held that the judge had made a mistake and the order was unconstitutional, it held that both the sheriff and Cuyahoga county were immune pursuant to the doctrine of absolute quasi-judicial immunity. **Id.**, 1430-32. As stated in **Doe**, individual corrections officers, who implemented a judge's illegal and unconstitutional but clearly "judicial" order, shared in his absolute immunity from damages under the doctrine of quasi-judicial immunity. 599 F.Supp at 1430.

Furthermore, if any errors were made with regard to the affidavits themselves, or with regard to the people against whom the affidavits were filed, such errors were clearly the fault of the Planned Parenthood employee who was charged with the responsibility of executing the affidavits (and whom petitioners have released from this litigation), not the fault of any respondent. And, it must be remembered that errors in the enforcement of a court order do not negate the absolute quasi-judicial immunity of the person directed to carry out the order, which immunity, of course, derives from and is equal to the immunity of the judge who issued the order. **Stump**, **Johnson**, **Mireles**, and **Doe**, *supra*.

That the trial court had both subject matter and personal jurisdiction below, and that both Judge Crush's injunction and his "Order to the Sheriff" issued in that case were legally valid, are matters no longer open to question. See **Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho** (1990), 52 Ohio St.3d 56. Thus, Judge Crush was and is entitled to absolute judicial immunity for his issuance of both the injunction and the order. **Stump v. Sparkman**, *supra*, 435 U.S. at 356-357; see also **Kelly v. Whiting** (1985), 17 Ohio St.3d 91, U.S. cert. denied, 106 S.Ct.532.

That the order is facially valid is readily apparent, and petitioners do not argue to the contrary. That the respondents appeared on site on June 28, 1986 and thereafter, and enforced the injunction on that date and thereafter, solely because of and in obedience to that order, is beyond rational argument.

Both federal and Ohio law are well-settled that all who act pursuant to a facially valid court order share in the issuing judge's absolute judicial immunity therefor. Accordingly, under the facts of this case, respondents, including Hamilton County itself, are entitled to absolute quasi-judicial immunity herein from all of petitioners' within claims, both federal and state. **Stump**, **Johnson**, **Mireles**, **Doe**, and **Kelly**, *supra*. "[T]he Sixth Circuit has repeatedly extended the absolute immunity accorded to judges to other individuals involved in the judicial process." **Doe**, at 1431. See also **Wholesale Electric Supply v. Robusky** (1970), 22 Ohio St.2d 181; **Scarso v. Cuyahoga County Dept. of Human Services**, 747 F. Supp. 381 (N.D. Ohio 1989); and **Pugh v. Parrish of St. Tammany**, 875 F.2d 436 (5th Cir. 1989) (absolute prosecutorial immunity granted to a Louisiana parish, which is the equivalent of an Ohio county).

Respondents submit that virtually all of the legal and public policy reasons enumerated in the various authorities cited hereinabove, for according absolute quasi-judicial immunity to those who comply with court orders, fully support the lower courts' grant of absolute quasi-judicial immunity from suit to respondents herein, including to respondent Hamilton County, Ohio. Furthermore, and perhaps even more importantly, the instant case presents another compelling reason why the grant of absolute quasi-judicial immunity to respondent Hamilton County must be left undisturbed: to the degree that petitioners were aggrieved by

their arrests, they were aggrieved solely by the injunction and order issued by Judge Crush, a state official for § 1983 purposes and nothing else. Thus, it simply would be neither fair nor just to penalize the citizens of one Ohio county (i.e., Hamilton County) for actions taken in accordance with a court order issued by a state, not a county, judge.[5]

Petitioners do not even pretend that the dicta they cite in support of their position is binding, and this Court and all parties know that it is not binding. Respondents submit that this dicta is both inapposite and unpersuasive, as well. Accordingly, the lower courts' decisions herein need not be and must not be disturbed.

Based upon all of the foregoing, it is readily apparent that the respondents were acting solely pursuant to and in conformity with a valid order of a state court judge when they arrested petitioners, and thus that all respondents, in all

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[5] In addition to their absolute quasi-judicial immunity from suit, respondents wish to reiterate and to stress that, since they acted as officers of the state and not of Hamilton County when complying with the state court judge's order to the Sheriff, they cannot be sued in their official capacities pursuant to §1983, since the state is not a "person" who can be sued under §1983 - see footnote 1 hereinabove; and that there was no actionable county policy or custom that was the "moving force" behind petitioners' claimed constitutional violations (see **Monell v. New York City Dept. of Social Services**, 436 U.S. 658, 694 (1978); and **Bachelier**, *supra*, at 6: "...[H]ere it is clear that Judge Crush's injunction, not any policy of appellees, was the moving force behind the alleged violation of appellants' constitutional rights..."). These are perhaps respondents' strongest two arguments, but, unfortunately, they were not addressed by any of the lower courts.

capacities sued, Hamilton County included, are entitled to absolute quasi-judicial immunity from suit, on all claims brought by petitioners.

ISSUE #3. COUNTY LAW ENFORCEMENT OFFICERS WHO EXECUTE THE VALID ORDER OF A STATE COURT JUDGE, AND ARE THEREAFTER SUED IN THEIR INDIVIDUAL CAPACITIES PURSUANT TO 42 U.S.C. §1983 FOR SO DOING, ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM SUIT.

Petitioners' second question presented (i.e., "Are law enforcement officials entitled to absolute quasi-judicial immunity from claims brought under 42 U.S.C. §1983 when their manner of enforcing a court order violated the order itself and resulted in constitutional violations?") is a red herring, because, as previously noted herein, both lower courts specifically found from the facts in the record before them that respondents did not violate Judge Crush's "Order to the Sheriff".

The order itself reads, in relevant part:

> The Sheriff of Hamilton County is hereby ordered to be present at the vicinity of 3332 Vine Street on Saturday, June 28, 1986, between the hours of 8:00 A.M. and 1:00 P.M. and during those hours to enforce the injunction filed herein on June 20, 1986. Said enforcement shall be by service of the order and arrest of violators, if any, upon whom the order has at any time been served.

As noted in the record before the lower courts, when

Judge Crush issued his order, he stated on the record, in open Court, *inter alia*,

> I do request orally that no arrests be made unless the service has been photographed, the violation has been photographed and an affidavit signed on the spot by someone who knows the facts. (Emphasis added.)

As the record below also reflects, on the date of the incident in question, respondents attempted to serve, and believed (and still believe) they had served, all persons in the area, including all petitioners, with a copy of the injunction prior to any arrests for violations of the injunction. Planned Parenthood representatives videotaped the entire protest scene continuously, and the only people arrested for contempt by respondents were those against whom an "Affidavit Charging Contempt" had been signed by a Planned Parenthood Staffer. Furthermore, each "Affidavit Charging Contempt" was captioned "State of Ohio, Plaintiff vs. _____, Defendant", stated that it was related to the underlying Common Pleas Court Case and gave that case number, and contained at least the following language:

> Before me, a Notary Public, personally came Robert Hatfield [an employee of Planned Parenthood] who, being duly sworn, according to law, states that on or about June 28, 1986, at Cincinnati, Ohio, [name of appellant] did violate the order of this Court filed and docketed June 20, 1986, and served upon said Defendant before the violation of the order.

Thus, it is clear that the Judge Crush's order was faithfully followed and obeyed by respondents to the best of their

knowledge and ability.

Contempt is *sui generis*, and is neither strictly criminal nor civil. There is in Ohio no set arrest procedure for contempt of court which either Judge Crush's order, or respondents' execution of the order, violated. The facts that service of the injunction on certain of the petitioners was apparently not videotaped and thus could not be verified later on at trial, or that certain of the contempt affidavits were later, after the heat of the moment, found to be incorrect or incomplete, and thus that petitioners were acquitted of contempt or had their contempt charges dismissed, do nothing to invalidate either the Judge Crush's ordered arrest procedure or respondents' faithful compliance with it. As this Court has noted in the past, even in a criminal case (which the instant case is not), "...The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted - indeed, for every suspect released..." **Baker v. McCollan**, 443 U.S. 137, 145 (1979). See also **Graham v. O'Connor**, 490 U.S. 386, 396 (1989) ("...The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California*, 401 U.S. 797...(1971)...).

As noted previously herein, respondents derive their absolute quasi-judicial immunity from Judge Crush who ordered them to enforce his injunction. Thus respondents, like Judge Crush, do not lose their absolute quasi-judicial immunity simply because there may have been minor unintentional and unknown deviations from the strict letter of the order. **Stump**, **Johnson**, **Mireles**, and **Doe**, *supra*. Surely, if absolute quasi-judicial immunity was accorded to the police officer defendants in **Mireles**, *supra*, it must also be accorded to the respondents under the circumstances of this

case.

CONCLUSION

Based upon all of the foregoing, respondents pray that petitioners within petition for a writ of certiorari be denied, in its entirety, at petitioners' cost and expense.

Respectfully submitted,

JOSEPH T. DETERS
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/s/_____

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APPENDIX A

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

No. C-1-85-1219

FILED
December 18, 1986

ASSOCIATION FOR CHILDREN FOR ENFORCEMENT OF SUPPORT, INC., et al.,
Plaintiffs,

v.

RONALD PANIOTO, et al.,
Defendants.

ORDER

This matter came on for consideration of the motion to dismiss of defendant Hamilton County, Ohio (Doc. 38) and plaintiffs' memorandum in opposition (Doc. 41) to which defendant has replied (Doc. 42); defendant Ronald Panioto's motion for summary judgment (Doc. 32) and plaintiffs' memorandum in opposition (Doc. 34), to which defendant has replied (Doc. 35); and plaintiffs' motion for partial summary judgment (Doc. 43), to which defendant has responded (Doc. 47) and plaintiff has replied (Doc. 49).

Since we previously set forth the facts giving rise to this litigation in our order denying injunctive relief (Doc. 27), we will outline the facts very briefly.

Plaintiffs' complaint was filed on August 20, 1985, instituting this action pursuant to 42 U.S.C. §1983, challenging defendants' policy of excluding members of the general public from proceedings of the Domestic Relations Division of the Hamilton County Court of Common Pleas, and plaintiffs requested this Court to render injunctive relief requiring defendants to open the proceedings to the public, declaratory relief, damages, costs, and attorney fees. By amendment on May 14, 1986 (Doc. 86), plaintiffs request a substantial amount of damages against defendant Hamilton County.

Defendant Panioto, in his capacity as Senior judge of the Domestic Relations Division of the Hamilton County Court of Common Pleas, moves for summary judgment in his favor on the basis that this case no longer presents a case or controversy and this action is now moot. At the time this Court ruled on plaintiffs' initial motion for injunctive relief, there was pending in the Hamilton County Municipal Court, a criminal action based on criminal trespass and disorderly conduct charges brought against Geraldine A. Jensen, one of the plaintiffs herein, who was arrested on June 27, 1985 when she attempted to attend and monitor child support proceedings.

On September 3, 1985, a hearing was held before the Honorable Deidra L. Hair, Judge of the Hamilton County Municipal Court, in the case of *State of Ohio v. Geraldine A.*

Jenson. On September 5, 1985, Judge Hair issued an opinion, finding that the blanket exclusion of observers, as a matter of policy, in the absence of some articulated overriding consideration, violates the public's First and Fourteenth Amendment rights.

A motion for leave to appeal the decision of the Hamilton County Municipal Court was filed by the State of Ohio shortly thereafter. After careful consideration, we declined to order injunctive relief on the basis of the strong policy of comity between state and federal judicial systems which mandates a "proper respect for state functions." *Younger v. Harris,* 401 U.S. 37, 44 {1971). Since the time we entered our order, the Court of Appeals declined to review Judge Hair's decision. (Dec. 32, Ex. A, certified copy of entry overruling motion for leave in *State of Ohio v. Geraldine A. Jensen,* No. C-850634 (1 st App. D. Ham. Cty. Oct. 21, 1985)).

Defendant Panioto states, by affidavit, that the Domestic Relations Division of the Hamilton County Court of Common Pleas has, from the date of this Court's decision on September 27, 1985, permitted the public to attend child support enforcement proceedings held before the Referees. (Doc. 33, Affidavit of Ronald Panioto).[1] Therefore, defendant contends that this action is now moot. Plaintiffs respond that the mere voluntary cessation of illegal conduct by a defendant does not deprive a court of jurisdiction in the

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[1] The affidavit of Judge Panioto is attached as "Appendix A".

action and that this action is not moot because of the possibility of recurrence. Defendant Panioto finally claims that notwithstanding how the mootness issue is resolved, he was clothed with absolute judicial immunity.

In considering a motion for summary judgment, the narrow question we must decide is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson,* 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied,* 444 U.S. 986 (1979). And, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." *Id.* at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.*, quoting Rule 56(c), Fed. R. Civ. P. Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.*

After carefully reviewing the papers filed in this case and considering the oral arguments presented by counsel on October 3, 1986, we conclude that this action is moot with

respect to preliminary and injunctive relief based upon judge Panioto's statement to the effect that he will abide by Judge Hair's decision and that he has been doing so since September 27, 1985. The defendant recognizes, and we agree, that the mere voluntary discontinuance of certain conduct may be insufficient to render a case moot. However, in order to satisfy a case or controversy requirement which is a prerequisite to this Court's exercise of jurisdiction, plaintiffs must show that there is a real or immediate threat that the conduct sought to be enjoined is likely to occur again. *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). In *Lyons,* the court observed "... that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects. *Id.* at 102.

The question we are most concerned with at present is whether recurrence is probable, as the court stated in *United States of America v. The Cleveland Trust Co.,* 392 F. Spp.. 699 (N.D. Ohio 1974):

> [I]f, in addition to the conduct's discontinuance, there are strong circumstances clearly rendering recurrence entirely improbable, ... a conclusion of mootness is warranted. (citations omitted).

Id. at 707.

It is undisputed that the prior policy of excluding the public from proceedings of the Domestic Relations Division of the Hamilton County Court of Common Pleas was

discontinued on September 27, 1985 and to date has not been reimplemented. Moreover, defendant has assured this Court that he would continue to abide by the decision of Judge Hair. Therefore, we conclude that a recurrence of the alleged wrongful conduct is entirely improbable and this action is now moot.[2]

In addition to the injunctive relief addressed above, plaintiffs have asserted a claim for relief in the form of compensatory and general damages against defendant Hamilton County. In paragraph 27 of the amended complaint, plaintiffs allege:

> The policy of Defendant Panioto barring members of the general public from proceedings before referees of the Domestic

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[2] We note that plaintiffs' amended complaint (Doc. 39) seeks only injunctive relief against defendant Panioto and our decision on the mootness issue renders it unnecessary to address the issue of judicial immunity raised by defendant Panioto. Judges presiding over courts of general and limited jurisdictions are absolutely immune from suits for damages, provided the judges did not engage in non-judicial conduct or act in the clear absence of all jurisdiction. *King v. Love,* 766 F.2d 962, 96566 (6th Cir. 1985); *see also, Sevier v. Turner,* 742 F.2d 262,271 (6th Cir. 1984). The Supreme Court has defined a non-judicial act as an action not ordinarily performed by a judicial officer or an act not performed by the judge in his official capacity. *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). Because of our decision on the mootness issue, we need not address the issue of whether excluding members of the public from the proceedings involved herein can be categorized as judicial conduct.

> Relations Division of the Hamilton County Court of Common Pleas is the official act, policy, custom, and practice of Defendant Hamilton County.

In *Monnell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a local government can be liable in a §1983 action when its official policy or governmental custom is responsible for a deprivation of constitutional rights. Therefore, the local government must be a "moving force" behind the deprivation. "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monnell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional [local government] policy, which policy can be attributed to a [local government] policy maker." *City of Oklahoma v. Tuttle,* 471 U.S.__ (1985).

Under the Eleventh Amendment, U.S.C.A. Const. Amend. 11, a state or its agencies cannot be sued in federal court without its consent. *Alabama v. Pugh,* 438 U.S. 781 (1978). The defendant Hamilton County argues that this action should be dismissed against it because it cannot be held liable for the acts of a senior Domestic Relations Judge since the judge is a state official rather than a county official. We agree with the parties that the pivotal issue in regard to Hamilton County is whether the Domestic Relations Division of the Hamilton County Court of Common Pleas is an agency of the state or county.

Defendant Hamilton County directs our attention to Article IV of the Ohio Constitution in support of its

contention that the Court of Common Pleas is a state court. Article IV § 1 of the Ohio Constitution states:

> The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme courts as may from time to time be established by law.

Article IV, §4(A) of the Ohio Constitution provides that "there shall be a court of common pleas and such divisions thereof . . . serving each county of the states" and in the interests of justice "two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district . . . ." Any judge of the court of common pleas or its divisions may temporarily hold court in any county. Moreover, the Ohio Supreme Court has general superintendence over all courts in the state and the Chief justice may assign judges of the court of common pleas and its divisions to sit or hold court in any other court of common pleas. *See* Article IV §§5. 6. Ohio Constitution: Ohio Rev. Code §§2503.04 and 141.07.

The gist of defendants' argument is that Judge Panioto cannot be a policy maker for Hamilton County as, pursuant to the Ohio Constitution, he is a member of the state judiciary. Defendants argue that this case is analogous to the Ninth Circuit case of *O'Conner v. State of Nevada*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982) wherein the Appellate Court reviewed the case of *O'Conner v. State of Nevada*, 507 F. Spp.. 546 (D. Nev. 1981). The court

concluded that the defendants Supreme Court and Third Judicial District Court of Nevada, were state agencies and therefore were immune from suit in a civil rights action in federal court because of the Eleventh Amendment. U.S.C.A. Const. Amend 11. *See, O'Conner,* 686 F.2d at 750.

Similar to the Ohio Constitution, the Nevada Constitution provides that judicial power of the state is vested in a court system comprised of a Supreme Court, District Court, and justices of the Peace. The state is divided into several districts with each district consisting of one county, except for one district which is comprised of two counties. Like Common Pleas judges in Ohio, District Judges in Nevada are elected by the qualified electors of their respective districts and the Chief justice of the state Supreme Court has judicial assignment powers. *See* Article 6 §§ I, 5, and 19, Nevada Constitution.

The common denominator between the Ohio and Nevada constitutions most apparent to this Court is that in both states supervisory and assignment powers over Common Pleas and District Courts are vested in the higher courts of the state and, although defined for convenience by county boundaries, a district may be comprised of more than one county.

In response, plaintiffs argue that the recent decision of *Pembauer v. City of Cincinnati,* 746 F.2d 337, 341 (6th Cir. 1984), *ruling precluding county liability reversed,* 54 U.S.L.W. 4289 {U.S. 1986} should govern the outcome of this case. Plaintiffs also cite *Crane v. Texas,* 759 F.2d 412 (5th Cir. 1985) as persuasive authority. Although we are

particularly persuaded by the manner in which the Ohio Constitution establishes the state court system, we have considered the following factors espoused in *Pembauer* and *Crane* for determining whether a person is a county official or state official for purposes of § 1983 liability:

1. Whether the official is elected by the residents of the county;

2. Whether the official is the "chief officer" of the county in a given area;

3. Whether the official submits budget requests to the county legislative body, which in turn furnishes his office, books, furniture and other materials;

4. Whether the official's salary and all training expenses are paid out of the general fund; and

5. Whether the official can be regarded as the ultimate repository of county authority.

Although none of these factors is itself determinative, they are important in our consideration. *Pembauer,* 746 F.2d at 341. While a Common Pleas Court judge is elected by the residents of the county, we find that defendant Panioto does not meet the remaining four criteria for determining that he is a county official.

We conclude that defendant Panioto, as Common Pleas Judge of the Domestic Relations Division, is not a

"chief officer" of Hamilton County. Unlike the county prosecutor or sheriff in *Pembauer,* a domestic relations judge reports to the Superior Court in Ohio.[3] Although a domestic relations judge in Ohio is ultimately responsible to the electorate, we question what the County Commissions of Hamilton County could do if they were vehemently opposed to the judge's policies. Furthermore, pursuant to the Ohio Constitution, a Judge of the Court of Common Pleas, of which the domestic relations division is a part, has statewide jurisdiction, may hold court in any county, is supervised by the Ohio Supreme Court, and is compensated, at least in part, from the state treasury. Ohio Rev. Code §141.04. Therefore, we find that defendant Panioto is not a county official for purposes of the Eleventh Amendment and Hamilton County's motion to dismiss should be granted.

Accordingly, the motion of defendant Hamilton County, Ohio (Doc. 38) and defendant Ronald Panioto's motion for summary judgment (Doc. 32) are hereby granted and this action is dismissed.

SO ORDERED.

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[3] Plaintiffs also cite *Crane v. Texas,* 759 F.2d 412 (5th Cir. 1985) and *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980) in support of their position. However, these judges were the executive officers of the administrative council for the Texas counties. Unlike a domestic relations judge in Ohio, a county judge in Texas presides over the County Commissions Court which is the chief administrative body in the county. *See, Crane,* 759 F.2d at 420,429.

/s/_____
S. Arthur Spiegel
United States District Judge

APPENDIX B

No. 90-3725

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
April 30, 1991
LEONARD GREEN, CLERK

VIRGINIA BACHELIER, et al.,
Plaintiffs-Appellants,

v.

HAMILTON COUNTY, OHIO, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio,
Western Division

BEFORE: KENNEDY AND RYAN, Circuit Judges, and FEIKENS, Senior District Judge.[1]

[1] The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

FEIKENS. Appellants brought suit in the United States District Court for the Southern District of Ohio, alleging claims under 42 U.S.C. §1983 against the City of Cincinnati, Hamilton County, and certain County officers, in their official capacities, for their role in enforcing an injunction issued by Hamilton County Court of Common Pleas Judge Thomas Crush. The district court dismissed appellants' claims. For the reasons set forth below, we AFFIRM the holding of the district court.

I. Background

Appellants are twenty-eight, persons who attempted to picket and protest at the Margaret Sanger Center ("Center") located at 3332 Vine Street in Cincinnati, Ohio. The Center is an abortion clinic operated by Planned Parenthood Association of Cincinnati ("Planned Parenthood").

On March 26, 1986, as a result of picketing at the Center, Planned Parenthood filed a lawsuit in the Hamilton County Court of Common Pleas, seeking a temporary restraining order, preliminary injunction and permanent injunction against certain individuals and organizations. See Planned Parenthood v. Project Jericho, et al., No. A8602417 (1986). Planned Parenthood's complaint alleged that certain persons and organizations disrupted the operation of the Center, harassed and intimidated staff and patients, blocked access to the building and created traffic problems.

The case was assigned to Hamilton County Common Pleas Judge Thomas Crush ("Judge Crush"). On April 4, 1986, Judge Crush issued a preliminary injunction against

certain named defendants, prohibiting them from shouting or chanting so loud as to be heard inside the Center, and from blocking the sidewalk. On April 3, 1986 Planned Parenthood filed an amended complaint seeking class certification and an injunction against a defendant class of protestors. On June 20, 1986, Judge Crush entered an order ("Crush injunction") which conditionally certified a defendant class comprised of:

> Persons picketing between the south curb of Louis Avenue and the north curb of Shields Avenue and on both sides of Vine Street from Louis Avenue to Shields Avenue who have been personally served with this order as well as their officers, agents, servants, employees, attorneys, and those persons in active concert and participation with them who received personal service of the order.

The order further defined "persons picketing" as:

> Persons present in the area referred to in this order who are carrying protest or informational signs, passing out literature, speaking publicly, or otherwise engaged in activity, intended to inform, influence, and persuade the public about matters of public interest, including abortion.

The Crush injunction prohibited screaming, chanting, speaking or singing in a manner intended to reach, or which had the effect of reaching patients inside the Center; screaming at patients entering or leaving the Center; blocking the driveway, entrances or exits from the Center or the public walkway in front of it; and mass picketing. The injunction

also limited the number of picketers on certain streets bordering the Center.

After Judge Crush issued the injunction, various defendants were charged with contempt and, after a hearing, found guilty. Of those found guilty, eighteen appealed to the Court of Appeals for Hamilton County.

The court of appeals affirmed the findings of contempt, but reversed the certification of a defendant class. Seventeen defendants appealed their contempt convictions to the Ohio Supreme Court, and Planned Parenthood cross-appealed on the reversal of class certification.

The Ohio Supreme Court upheld the contempt citations, holding that the Crush injunction was a reasonable time, place and manner restriction on appellants' first amendment rights. However, it reversed the court of appeals on the class certification issue, finding that the defendant class was properly certified by Judge Crush. See Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990).

Thereafter, appellants[2] filed suit in United States District Court against the City of Cincinnati, Hamilton County, and various County officers,[3] for their role in

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[2] Of the twenty eight appellants, six were parties to the Planned Parenthood lawsuit.

[3] None of the appellees were parties to the Planned Parenthood lawsuit.

enforcing the Crush injunction. Counts I through III of appellants' complaint alleged that their rights under the first, fifth, and fourteenth amendments of the United States Constitution were violated by defendants' attempts to enforce the Crush injunction. Count IV alleged that the defendants conspired to enforce the Crush injunction in a discriminatory manner in violation of plaintiffs' right to equal protection under the fourteenth amendment. All of appellants' claims were predicated on 42 U.S.C. S 1983.

The district court dismissed counts I through III of appellants' complaint, finding that the Ohio Supreme Court decision in Planned Parenthood precludes appellants from attacking the constitutionality of the Crush injunction. Alternatively, the district court held that appellants could not state a claim under § 1983 against appellees because the alleged violation of appellants' constitutional rights was due to the facially valid Crush injunction, not to any policy adopted by the City and County. The court dismissed count IV of the complaint because it found no factual basis for appellants' claim of discriminatory enforcement.

II. Analysis

The first question we must address is whether the district court properly held that appellants are precluded from challenging the validity of the Crush injunction because of the Ohio Supreme Court's decision in Planned Parenthood.

Although only six of the appellants were parties to the Planned Parenthood lawsuit, all of the appellants were members of the defendant class to which the Crush injunction

applied. Therefore, appellants are bound by the Ohio Supreme Court's decision upholding the validity of that injunction.[4]

Judicial review of final determinations in state Judicial proceedings can be obtained only in the United States Supreme Court. See, e.g. In Re Sun valley Foods Co., 801 F.2d 186, 189 (6th Cir. 1986). A United States district court "has no authority to review final Judgments of a state court in Judicial proceedings" Id. (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). This is true even though the state court Judgment may have been erroneous. Id. The district court, therefore, properly refused to review the correctness of the Planned Parenthood decision.

Additionally, appellants cannot prevail under 42 U.S.C. S 1983 because they cannot show that an official policy of defendants was the moving force behind their alleged constitutional violation. As the United States Supreme Court held in Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985):

> [T]o establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right

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[4] The Ohio Supreme Court reviewed the breadth of the injunction and found it to be binding upon parties and non-parties acting in concert or participation with a party who had actual notice of the injunction. Presumably these appellants had actual notice of the injunction since they now claim that enforcement of the injunction deprived them of their constitutional rights.

> .... More is required in an official-capacity action, however, for a governmental entity itself is liable under § 1983 only when the entity itself is a "moving force' behind the deprivation, Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting Monell, supra, 436 U.S., at 694...); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law (citations omitted).

Here, it is clear that Judge Crush's injunction, not any policy of appellees, was the moving force behind the alleged violation of appellants' constitutional rights. Appellees' decision to enforce a facially valid injunction does not subject them to Section 1983 liability. See Richardson v. City of South Euclid, No. 89-3056 (6th Cir. June 11, 1990). Nor can the order of Judge Crush be imputed to Hamilton County as a policy since Judge Crush is a state, not county, official. See Association for Children for Enforcement of Support, Inc. v. Paniato, No. C-1-85-1219 (S.D. Ohio Dec. 18, 1986).

Appellants also appeal the dismissal of their discriminatory enforcement claim. They argue that the Crush injunction was discriminatorily enforced because Planned Parenthood personnel were allowed to walk freely through restricted picket zones wearing the designation 'clinic escort' while protestors were barred from those areas.

The district court properly rejected this argument. Wearing a badge with the inscribed words "clinic escort" does not constitute picketing within the meaning of the Crush injunction. Accordingly, appellants cannot claim that the

Crush injunction was discriminatorily enforced.

The holding of the district court therefore is AFFIRMED.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
FEB 17 1998
CLERK

No. 97-961

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JAMES J. CONDIT, JR., et al.,

Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Hamilton County Court of Appeals
First Appellate District Of Ohio

PETITIONERS' REPLY BRIEF

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PRELIMINARY COMMENTS

This is a summary judgment proceeding. There are no disputed facts before this Court. The relevant court orders were stipulated into the record and appear as Appendices F and G of the Petition. The Petitioners' innocence and the evidence that they were arrested while complying with Judge Crush's Preliminary Injunction ("Injunction") is likewise undisputed. This Court must not be misled into thinking otherwise.

The greatest danger of error is posed by the Respondents' insistence that they acted "in accordance with" the court order (City's Brief at 2), "solely because of and in obedience to that order" (County's Brief at 21) or "pursuant to and in conformity with a valid order" (County's Brief at 21). Such assertions are false, and are nothing but "spin" from the wrongdoers.[1]

Petitioners will reinforce this point with the most obvious example of unrebutted evidence that Respondents violated the Order to the Sheriff ("Order"). The Injunction had to be served upon an individual as a prerequisite of class membership, and only class members were enjoined. Likewise, the Order required service of the Injunction. Yet, seven of these Petitioners were arrested without being served[2], a direct violation of the Order and the legal equivalent of arresting innocent people who had committed no

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[1] Likewise, Respondents comments suggesting that Petitioners were linked to "imminent violence" (County Brief at 10) or were "violators" of the Injunction (County Brief at 11) are at best diversionary and at worst deliberately misleading.

[2] The record contains uncontradicted affidavits by Petitioners Tidwell, Miller, Spry, Cynthia Conklin, David Conklin, Gerald Taylor and Kathleen Engel that they were arrested without ever receiving a copy of the Injunction.

crime and were unrelated to any litigation.

No matter how many times the Respondents say otherwise, and notwithstanding the Court of Appeals' opinion[3], the facts are the facts, they are in this record, and the Petitioners have stated them correctly. The Respondents *violated* the Order when they arrested twelve innocent people who had never been served and/or were complying with the Injunction. Accordingly, the Petition presents pure issues of law regarding the proper application of the immunity doctrines.

(A) PETITIONERS' REPLY ON THE IMMUNITY ISSUES.

1. There Is No Absolute Judicial Immunity For Cities and Counties.

Respondents cited only two cases for the proposition that cities and counties, as governmental entities, can benefit from the absolute immunities normally available only to government officials: *Doe v. McFaul*, 599 F.Supp. 1421 (N.D. Ohio 1984) (judicial immunity) and *Pugh v. Parish of St. Tammany*, 875 F.2d 436 (5th Cir. 1989) (prosecutorial immunity). In fairness to both courts, *McFaul* and *Pugh* pre-dated this Court's guidance in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993). It is not surprising, however, that neither court provides *any* analysis on the individual/governmental distinction before generously showering individual immunities upon governmental entities. Nor does either court cite case law to support a theory for

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[3] The Court of Appeals did not even bother to mention in its Opinion that seven of these Petitioners were arrested without being served with the Injunction, yet it upheld summary judgment against them while concluding that there was insufficient evidence that Respondents had acted "beyond the judge's order" (Appendix to Petition at p. 10a), whatever that means.

absolute governmental immunity.

The County Respondents characterized this Court's instruction in *Leatherman* as "dicta" which is "unpersuasive". County Brief at 18. One wonders what the Respondents would find persuasive, if not a unanimous opinion of this Court. Only those intent on misreading *Leatherman* could conclude that counties or cities can benefit from absolute judicial immunity, or any other personal immunity. It is, therefore, no surprise when courts drawing that conclusion can not support it with any meaningful case law.

2. There Is No Absolute Judicial Immunity For Violators of a Judicial Order.

The individual Respondents argue that they are entitled to absolute (quasi-)judicial immunity. Their entire argument is based on the fallacious premise that they complied with the Order. None of the case law cited by Respondents stands for the proposition that law enforcement officials can violate the judicial order which they are charged with enforcing and still benefit from absolute immunity. Nor did the Court of Appeals address that issue, except to create confusion by stating that "the propriety of extending immunity is enhanced by the fact that the order at issue has been held to be valid." Appendix to Petition at p. 10a. Petitioners assume that the "order at issue" means the underlying injunction which was upheld in *Planned Parenthood v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990), a decision which has nothing to do with the Respondents' agreement with Planned Parenthood which caused the wrongful arrests at issue in this case.

(B) PETITIONERS' RESPONSE TO RESPONDENTS' OTHER ARGUMENTS FOR DENYING PETITION.

1. Supreme Court Jurisdiction.

The County argues that this Court lacks jurisdiction to grant the Petition. The County's misdirected argument is really an attack on the merits of the issues raised in the Petition. The procedural history of this case very clearly satisfies the certiorari jurisprudence of this Court, which will consider exercising jurisdiction when:

> A state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10(c).

Substantively, the immunity issues raised in the Petition satisfy Rule 10 for three reasons. First, the disposition by the Court of Appeals which awarded absolute judicial immunity to the City and the County is a misstatement of law and *not* "the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Second, the distinction between individual immunities and municipal immunities are of such importance that this Court has been periodically moved to discuss them in other cases which, at their core, presented other issues. See *Kentucky v. Graham*, 473 U.S. 159 (1985) and *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993). Yet, as clear as this Court was in both *Graham* and *Leatherman*, lower courts are apparently still missing the point. Contrary to the County's suggestion, therefore, the

Petition presents this Court with an opportunity to settle an important principle for §1983 litigants: that governmental entities such as cities and counties are not entitled to benefit from the individual immunities which flow from the acts of judges.

Finally, if the Court of Appeals opinion in this case does not conflict with a prior holding of this Court, it certainly conflicts with "relevant decisions of this Court", Supreme Court Rule 10, such as *Leatherman* and *Graham*.

2. The Record Supports City and County Liability Under 42 U.S.C. §1983.

To prove a claim under 42 U.S.C. §1983, a plaintiff must allege: (1) "that some person has deprived him of a federal right," and (2) "that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Neither of these elements is challenged by Respondents, nor were they ruled upon by the lower courts.

However, both the City and the County suggest alternative reasons why they, as governmental entities, can have no liability in this case. Petitioners have the burden of establishing that the governmental entities had a policy or custom which was the moving force behind the violations. *Monell v. Department of Social Services* 436 U.S. 658 (1978); *City of Canton v. Harris* 489 U.S. 378 (1989). Petitioners submit that the *stipulated* evidence easily meets that burden.

(i) COUNTY LIABILITY

County liability rests squarely on *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), because Sheriff Stokes and his whole chain of command were direct participants in the arrest scheme which caused the arrests. There is no doubt that in Ohio the county sheriff is not only a county official but the "chief law

enforcement officer of the county." *Id.* at 476 (citing *Pembaur v. City of Cincinnati*, 74 F.2d 337 (6th Cir. 1984)). The County knows this to be correct and does not suggest otherwise. Indeed, Petitioners submit that the County's liability under *Pembaur* is so obvious, based on the Sheriff's direct involvement in the arrests, that if the Court of Appeals is reversed on the immunity issue the only proper result on remand will be summary judgment in favor of Petitioners and against the County.

The County does not even mention *Pembaur*, relying instead on the theory that a Common Pleas Judge in Ohio is a state official rather than a county official, and that it was therefore State policy (i.e., the judicial order) which was the moving force behind the arrests in this case. Such an argument assumes the one fact that the County would like to prove (i.e., that there was no County policy at work) and ignores the role of the Sheriff in setting up the arrest procedure with Planned Parenthood.

The most telling aspect of the County's Brief is its references to Planned Parenthood's "responsibilities" on the day of the arrests. County Brief at pp. 8, 20. This Court will search in vain throughout the Injunction, the Order or the entire record for any role assigned to Planned Parenthood by Judge Crush. Planned Parenthood had no role until the Sheriff gave away his discretion and "responsibilities" for enforcing the Injunction. Thus, the more appropriate principle for deciding the "state policy vs. county policy" argument appears in *Garner v. Memphis Police Dept.*, 8 F.3d 358 (6th Cir. 1993), where the Defendants claimed that they had no choice but to follow a state statute. The 6th Circuit rejected that argument after observing that the Defendants in *Garner* "did exercise their freedom to choose a more restrictive policy" than the state statute, a choice which constituted "a deliberate choice from among various alternatives under *Pembaur*". *Garner* at 364.

Likewise, the County in this case chose from a multitude of enforcement options and made the incredible decision to rely on

Planned Parenthood to determine who should be arrested. The County simply can not blame Judge Crush for its own ill-conceived plan which led to the arrests of twelve innocent people.

(ii) CITY LIABILITY

The City Respondents argue that Joseph Martin (the only Petitioner with claims against them) "is unable to establish the requisite elements for liability under 42 U.S.C. §1983 for both the City and the individual Defendants", City Brief at 4, but limit their argument to the immunity of police officers Hudson and Cain (City's Brief at 10-11) and a largely irrelevant review of municipal liability theories. (Id. at 4 -9)

City liability in this case rests on the City's *stipulation* that officers Hudson and Cain arrested plaintiff Joseph Martin *pursuant to the policies, customs, training and instruction of the City of Cincinnati and the City of Cincinnati Police Division*. This is tantamount to an admission of liability once a constitutional violation has been established. The City failed to address this point at all in its brief, but instead wasted a lot of time discussing respondent superior, failure to train, deliberate indifference, and other issues relating to municipal liability under 42 U.S.C. §1983. Once the City stipulated that its arresting officers acted pursuant to the policies and customs of the City, there was no need for Petitioners to pursue discovery of City leaders attempting to prove theories already encompassed within the stipulation.

A final comment is needed regarding *Bachelier et al., v. Hamilton County, et al.*, No. 90-3725 (6th Cir. April 30, 1991; unreported), an opinion which appears as an Appendix to the County's Brief and was discussed by both the County and the City in their briefs. Contrary to the City's Brief at p. 7, *Bachelier* had nothing to do with these arrests or any other arrests. The theory of

Bachelier, brought on behalf of individuals who (except for a few) always complied with the Injunction, was that Judge Crush's Injunction was unconstitutional, and that Hamilton County was liable for the First Amendment violations because the Sheriff (a policy-making official for the County) elected to enforce it. While *Bachelier* was pending in the District Court on June 20, 1990, the Supreme Court of Ohio upheld the Injunction in *Planned Parenthood v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990). The Sixth Circuit upheld the dismissal of *Bachelier* on preclusion grounds and also because the County had done nothing more than enforce a valid court order.

Bachelier , with which Petitioners disagree for reasons not readily apparent in the unpublished opinion, is worth discussing here if only because of its contrast with this case. In *Bachelier*, the Sheriff did what he was ordered to do by enforcing the Injunction of a state court judge. In this case, the Sheriff went a step further by delegating his enforcement discretion to Planned Parenthood and then arresting people who should never have been arrested based upon the explicit terms of the Order. The true "moving force" behind the arrests in this case was clearly the decision of the Sheriff, and not the orders of the judge.

(C) PUBLIC POLICY CONSIDERATIONS

There is a public policy consideration which underlies Petitioners' argument that cities and counties should not benefit from absolute judicial immunity even if the individual officials do: separation of powers. Do we not want a certain tension to exist between the judicial and executive branches of government? If a judge afflicted by bias, corruption, mental illness or some other cause substantially overreaches his authority and/or orders conduct which is clearly unlawful and harmful to innocent people, is it not *desirable* for policy making officials in the law enforcement area to question such orders? If the judge in *Mireless v. Waco*, 502 U.S. 9 (1991), for example, issued a standing order for the Sheriff to

"seize with excessive force" all attorneys late for court appearances, would we not want the Sheriff (or other policy makers) to question that order, and to refuse to execute it? Maybe we should not hold hapless individuals responsible for executing clearly unconstitutional court orders, but when the executive branch of government is willing to go along as a matter of policy or custom, such immunity is neither necessary nor desirable. It is for this reason that *Leatherman's* "dicta" is correct and this case was wrongly decided by the Ohio courts.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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